



MISSISSIPPI CODE 1972
Annotated

Civil Practice and Procedure

(§ 11-7-1 to
§ 11-35-61)

Title 11

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MISSISSIPPI CODE

1972

ANNOTATED

ADOPTED AS THE OFFICIAL CODE OF THE
STATE OF MISSISSIPPI
BY THE
1972 SESSION OF THE LEGISLATURE

VOLUME THREE

CIVIL PRACTICE AND PROCEDURE

§§ 11-7-1 to 11-35-61

CONTAINING PERMANENT PUBLIC STATUTES OF MISSISSIPPI
TO THE END OF THE 2004 REGULAR SESSION AND
1ST AND 2ND EXTRAORDINARY LEGISLATIVE SESSIONS



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PREFACE

The Mississippi Code of 1972, which became effective on November 1, 1973, is the culmination of nearly four years of effort on the part of the Legislature, the Attorney General's office and the publishers, which brings together provisions of general statutory law having a common subject matter into a more orderly and logical framework of code titles and chapters, and employing a modern and effective section numbering system. A major by-product of the code revision will be the state-owned magnetic computer tape containing the Mississippi Code of 1972, which will be of invaluable assistance to the Legislature and to the state.

The enabling act for the code was a recommendation of the Mississippi State Bar, which resulted in the consideration and passage of Senate Bill 1964, Chapter 465, Laws of 1970, signed into law by Governor John Bell Williams.

The Code Committee provided for in that act was comprised of A. F. Summer, Attorney General, Heber Ladner, Secretary of State, Representative Edgar J. Stephens, Jr., Chairman, House Appropriations Committee, Senator William G. Burgin, Jr., Chairman, Senate Appropriations Committee, Representative H. L. Meredith, Jr., Chairman, House Judiciary "A" and Judiciary en banc Committees, Senator E. K. Collins, Chairman, Senate Judiciary "A" and Judiciary en banc Committees, Representative Ney McKinley Gore, Jr., Chairman, House Judiciary "B" Committee, and Senator William E. Alexander, Chairman, Senate Judiciary "B" Committee. In 1972, Representative Marby Robert Penton and Senator Herman B. Decell, Chairman of House and Senate Judiciary "B" Committees, respectively, became members of the Committee, replacing Representative Gore and Senator Collins, Senator Alexander having been appointed Chairman of Senate Judiciary "A" and Judiciary en banc Committees. The Deputy Attorney General, Delos H. Burks, served the Code Committee as Secretary. Special Assistant Attorney General Fred J. Lotterhos, under the supervision of the Attorney General, was assigned the principal responsibility for the supervision of the recodification, including the consideration and treatment of some 16,000 sections of code manuscript.

Final legislative approval was given to the Mississippi Code of 1972 by passage of Senate Bill 2034, Laws of 1972, which was signed by Governor William L. Waller on April 26, 1972. A copy of that act is set out in Volume 1, following the Publisher's Foreword.

The Code Committee is of the opinion that the recodification has been thoroughly and well accomplished, and will result in a greatly improved repository of the general statutory law of the state.

A. F. SUMMER
ATTORNEY GENERAL

PUBLISHER'S FOREWORD

This 2004 Replacement Volume 3 of the Mississippi Code of 1972 Annotated represents material appearing in the original 1973 bound volume. It also constitutes a record of amendments, repeals, and new Code provisions enacted by the Mississippi Legislature through the 2004 Regular Session and 1st and 2nd Extraordinary Sessions.

This volume contains the full text of Chapters 7 through 35 of Title 11, of the Mississippi Code of 1972 Annotated, as amended through the 2004 Regular Session and 1st and 2nd Extraordinary Sessions.

Case annotations are included from decisions of the state and federal courts in cases arising in Mississippi. Many of these cases were decided under the former statutes in effect prior to the enactment of the Code of 1972. These earlier cases have been moved to pertinent sections of the Code where they may be useful in interpreting the current statutes. Annotations to collateral research references are also included.

To better serve customers by making annotations more current, LexisNexis has changed the sources that are read to create the annotations. Rather than waiting for cases to appear in printed reporters, we now read court decisions as soon as they are released by the courts. A consequence of this more current reading of cases and the posting of notes online on LexisNexis, is that the most recent cases annotated may not yet have print reporter citations. These will be provided in later publications as they become available.

This publication contains annotations taken from decisions of the Mississippi Supreme Court and the Court of Appeals with decision dates up to April 27, 2004, and decisions of the appropriate federal courts with decision dates up to March 16, 2004. These cases will be printed in the following reporters:

- Southern Reporter, 2nd Series
- United States Supreme Court Reports
- Supreme Court Reporter
- United States Supreme Court Reports, Lawyers' Edition, 2nd Series
- Federal Reporter, 3rd Series
- Federal Supplement, 2nd Series
- Federal Rules Decisions
- Bankruptcy Reporter

Additionally, annotations have been taken from the following sources:

- American Law Reports, 5th Series: through 117 A.L.R.5th
- American Law Reports, Federal Series: through 192 A.L.R.Fed
- Mississippi College Law Review: through 20 Miss. Coll. L.R. 211
- Mississippi Law Journal: through 72 Miss. L.J. 1029

Finally, published Opinions of the Attorney General and opinions of the Ethics Commission have been examined for annotations.

A comprehensive Index appears at the end of this volume.

PUBLISHER'S FOREWORD

Visit the LexisNexis website at <http://www.lexisnexis.com> for an online bookstore, technical support, customer support, and other company information.

For further information or assistance, please call us toll-free at (800) 833-9844, fax us toll-free at (800) 643-1280, e-mail us at customer.support@bender.com, or write to: Mississippi Code Editor, LexisNexis, P.O. Box 7587, Charlottesville, VA 22906-7587.

September 2004

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User's Guide

This guide is designed to help both the lawyer and the layperson get the most out of the Mississippi Code of 1972 Annotated. Information about key features of the Code and suggestions for its more effective use are given under the following headings:

- Advance Code Service
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- Amendment Notes
- Analyses
- Attorney General Opinions
- Code Status
- Comparable Legislation from other States
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- Tables

If you have a question not addressed by the User's Guide, or comments about your Code service, you may contact us by calling us toll-free at (800) 833-9844, faxing us toll-free at (800) 643-1280, e-mailing us at customer.support@bender.com, or writing to Mississippi Code Editor, LexisNexis, P.O. Box 7587, Charlottesville, VA 22906-7587.

ADVANCE CODE SERVICE

Three times a year, at roughly quarterly intervals between delivery of Code supplement pocket parts, we publish the Mississippi Advance Code Service pamphlets. These pamphlets contain updated statutory material and annotations to Attorney General opinions, research and practice references, and recent court decisions construing the Code. Each pamphlet is cumulative, so that each is a "one-stop" source of case notes updating those in your Code bound volumes and pocket parts.

ADVANCE SHEETS

The Advance Sheets consist of a series of pamphlets issued in the spring. The series reproduces the acts passed by the Mississippi Legislature and

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approved by the Governor during the legislative session. Features include tables showing the impact of legislation on sections of the Mississippi Code of 1972 Annotated, and a cumulative index. These pamphlets enable the user to receive a preview of approved legislation prior to supplement availability, and serve as an excellent source of legislative history.

AMENDMENT NOTES

Every time a Code provision is amended, we prepare a note describing the effect of the amendment. By reading the note, you can ascertain the impact of the change without having to check the former statute itself.

Amendment notes are retained in the Supplement until the bound volume is replaced, at which time notes from all but the last two years are deleted.

ANALYSES

Each title, chapter, and article appearing in a bound volume or supplement is preceded by an analysis. The analysis details the scope of the title, chapter, and article and enables you to see at a glance the content of the title, chapter, and article without resorting to a page-by-page examination in the bound volume or supplement.

ATTORNEY GENERAL OPINIONS

Opinions of the attorney general for the state of Mississippi have been read for constructions of Mississippi law. Notes describing the subject matter of the opinions have been placed under relevant code provisions under the heading "Attorney General Opinions." The citation at the end of each note refers to the person requesting the opinion, the date of the opinion, and the opinion number.

CODE STATUS

The Mississippi Code of 1972 Annotated is Mississippi's official code and is considered evidence of the statute law of the state of Mississippi (see § 1-1-8). The Code was enacted by Chapter 394 of the Laws of 1972, which was signed by the Governor on April 26, 1972.

The text of Chapter 394 is printed in Volume 1, on the pages following the Publisher's Foreword. In addition, Title 1, Chapters 1 through 5 of the Code contain statutes governing the status and construction of the Code.

COMPARABLE LEGISLATION FROM OTHER STATES

Notes to comparable legislation from other states appear for uniform laws, interstate compacts, statutory provisions pertaining to reciprocity and cooper-

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ation with other states, and various important statutes of general interest. Other states' statutes that are similar in subject matter and scope to those of Mississippi are cited, generally, under the first section of the chapter or article to which they pertain. Occasionally, comparable legislation pertains to only one section, in which case it is cited under that section rather than at the chapter or article level.

See also *Federal Aspects*.

COURT RULES

The Mississippi Court Rules are published separately by LexisNexis in a fully annotated softcover volume which is replaced annually and supplemented semi-annually.

The Court Rules volume contains statewide rules of procedure of the state courts, the local rules of the United States district courts and bankruptcy courts for Mississippi, and the rules of the United States Court of Appeals for the Fifth Circuit. Rules are received from the courts and edited only for stylistic consistency. For further information, see the Preface to the Mississippi Court Rules volume.

CROSS REFERENCES

Cross references refer you to notes under other Code sections, that may affect a law or place it in context. Cross references also are used under repealed provisions to refer you to an existing law on a similar subject. Cross references do not cite all related statutes, however, since these can be identified by using the General Index.

See also *Comparable Legislation from other States and Federal Aspects*.

EDITOR'S NOTES

Editor's notes are notes prepared by the Publisher that contain information about important or unusual features of a law, or special circumstances surrounding passage of the law, that are not apparent from the law's text.

See also *Effective Dates*.

EFFECTIVE DATES

Absent a specific effective date provision within an act, Mississippi laws generally take effect upon approval date, which is the date the act is signed into law by the Governor. Acts affecting voting rights and procedures take effect on the date the United States Attorney General interposes no objection under § 5 of the Voting Right Act of 1965.

FEDERAL ASPECTS

Notes to federal legislation that is similar in subject matter and scope to the laws of Mississippi are referenced throughout the Code. In addition, the

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Code contains the United States Code Service citation for any federal law that is referred to in a Mississippi statute by its popular name or by its session law designation.

See also *Comparable Legislation from other States*.

INDEX

The Code is completely indexed in two softcover Index volumes, which are updated and replaced annually. In addition, each volume of the Code is followed by its own index. As accurate and thorough as the Index is, your best defense against index wild goose chases is familiarity with indexing techniques. To that end, an explanatory Foreword to the Index appears in the first Index volume.

JOINT LEGISLATIVE COMMITTEE NOTES

Joint Legislative Committee notes are included in the Code to describe codification decisions made by the Mississippi Joint Legislative Committee on Compilation, Revision and Publication of Legislation. Examples of Committee actions that warrant the inclusion of a note are the integration of multiple amendments to a single Code section during the same legislative session, and the correction of typographical errors appearing in the Code.

JUDICIAL DECISIONS

Every reported case from the Supreme Court of Mississippi, the Court of Appeals of Mississippi, federal district courts for Mississippi, the federal Fifth Circuit Court of Appeals and the United States Supreme Court has been read for constructions of Mississippi law. These constructions are noted under pertinent sections of the statutes or Mississippi Constitution provisions, under the heading "Judicial Decisions." Where a decision has been reviewed by a higher court, subsequent judicial history and disposition is noted in the case note if such disposition has any bearing on the annotated material. Where two or more decisions state the same rule of law, the case citations are cumulated under one case note.

Case notes are grouped together under headings called "catchlines." The catchlines identify the basic subject matter of the case notes and assist the user in locating pertinent notes. Catchlines are numbered and arranged thematically, with "In general" first. Where there are two or more catchlines, an analysis, listing all the catchlines, precedes the annotations.

Frequently, statutes carry notes to cases that arose under earlier laws on the same subject. Case notes are retained so long as the editor believes the note will have some relevance under current law, though of course the relevance may be diminished by later changes in the law. These case notes appear under the heading "Decisions under former law."

ORGANIZATION AND NUMBERING SYSTEM

The Code is organized by titles, chapters, articles, subarticles, undesignated centered headings and sections. Analyses at the beginning of each title, chapter, article, and subarticle help you understand the internal arrangement of each Code unit (see *Analyses*).

Odd numbers are generally used for the numbering of titles, chapters and sections. Even numbers have been used for some chapters and sections so that a particular new chapter or section might be logically placed with other chapters and sections dealing with the same or similar subject matter. Similarly, the use of numbers with decimal points has been used for some sections in order that they may be inserted among other sections pertaining to the same subject.

The title, chapter, and section for each Code section is revealed by its section number. Thus, in the designation “§ 1-3-65,” the first digit (“1”) means the provision is in Title 1 (“Laws and Statutes”); the second (“3”) indicates Chapter 3 (“Construction of Statutes”); and the last two digits (“65”) mean the 65th section in that chapter (“Construction of terms generally”).

Articles and subarticles are not reflected by section number designations.

Within sections, subsections and paragraphs usually are designated following this pattern: (1)(a)(i)1. or (1)(a)(i)A. A distinctive indention scheme is applied to suggest the relative value of each unit within this hierarchy.

PLACEMENT OF NOTES

Where a note pertains to a single statute section, it will of course be set out following that section. In many instances, however, a note applies equally to several statute section or to an entire chapter or article. If the pertinent sections are scattered, or few in number, the note will be duplicated for each section. But where the note applies to all or most of the sections in a chapter or article, we prevent the space-consuming repetition of notes by placing the note at the very beginning of the chapter or article. Look for these unit-wide notes between the title, chapter, or article analysis and the first section in that unit.

REPLACEMENT VOLUMES

The Code is periodically updated and streamlined by the replacement of volumes. Although a current set of the Code contains all currently applicable statutes, we encourage you to retain replaced volumes and their supplement pockets parts for historical reference.

RESEARCH AND PRACTICE REFERENCES

Citations to references in American Jurisprudence, American Jurisprudence Pleading and Practice, American Jurisprudence Proof of Facts, Ameri-

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can Jurisprudence Trials, American Law Reports, First through Fifth Series, ALR Federal, Corpus Juris Secundum, various other treatises and practice guides, and Mississippi law journals are given under this heading, wherever the references appear to discuss the statute under which the citation appears, or a topic related to the statute. These citations are intended only to give you a starting point for your library research. The Mississippi law journals include Mississippi Law Journal and Mississippi College Law Review.

SOURCE NOTES

Each section of the code is followed by a brief note showing the acts of the legislature on which it is based, including the act that originally enacted the section and any subsequent amendments.

The source note follows the section text, preceding any other annotations for the section. Information in the source note is listed in chronological order, with the most recent information listed last. If a section has been renumbered, the former number will appear in the source note. References to comparable provisions in statutes also are listed.

The tables volume should also be consulted when researching the history of a statutory section, since it contains cross reference tables that provide a statutory citation for each section of the session laws and the date each act went into effect.

STATUTE HEADINGS

Headings or “catchlines” for Code sections and subsections are generally created and maintained by the publisher. They are mere catchwords and are not to be deemed or taken as the official title of a section or as a part of the section. Your suggestions for the improvement of particular catchlines are invited.

TABLES

The Mississippi Code of 1972 Annotated contains several tables that can assist you in your research. These are published in the Statutory Tables volume of the Code, and include the following:

- Sections of the Code of 1930 carried into the Code of 1942.
- Sections of the Code of 1942 carried into the Code of 1972.
- Allocation of Acts of Legislature, 1931 — 1972.
- Allocation of Acts of Legislature, 1972 — present.
- Consolidated Tables of amendments and repeals of 1942 Code sections.
- Consolidated Tables of amendments and repeals of 1972 Code sections.

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§ 11-7-1. Provisions applicable to all courts.

All things contained in this chapter, not restricted by their nature or by express provision to particular courts, shall be the rules of decision and proceeding in all courts whatsoever.

SOURCES: Codes, Hutchinson's 1848, ch. 53, art. 2 (100); 1857, ch. 61, art. 189; 1871, § 630; 1880, § 1585; 1892, § 629; Laws, 1906, § 687; Hemingway's 1917, § 465; Laws, 1930, § 474; Laws, 1942, § 1412.

Cross References — Other sections derived from same 1942 code section, see §§ 11-1-57, 11-11-1.

Judges, terms, general powers and duties of circuit court, see Chapter 7 of Title 9.

Trial of right of property, see Chapter 23 of this title.

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Suits against state or its political subdivisions, see Chapter 45 of this title.

Rules of evidence generally, see Chapter 1 of Title 13.

Process, publication and notice generally, see Chapter 3 of Title 13.

Procedural rules applicable to civil actions, see Miss. R. Civ. P. 1 et seq.

Procedural rules applicable to practice in Mississippi circuit and county courts, see Uniform Rules of Circuit and County Court Practice, Rules 1.01 et seq.

JUDICIAL DECISIONS

1. In general.
2. Venue.
3. Dismissal.
4. Evidence.

1. In general.

In view of the section [Code 1942, § 1412] and Code 1930, §§ 575, 1397 case held triable at return term of circuit court, where summons was served July 21 and made returnable August 20, as against contention that both day of service and day of return had to be excluded. Mississippi Cent. R.R. v. Aultman, 173 Miss. 622, 160 So. 737 (1935), appeal dismissed, 296 U.S. 537, 56 S. Ct. 108, 80 L. Ed. 382 (1935), overruled on other grounds, Combs v. Adams, 350 So. 2d 41 (Miss. 1977).

By this section [Code 1942, § 1412], the provisions of the chapter are made appli-

cable to all courts, and this embraces the county court; and, accordingly, conviction on a plea of guilty entered on an amendable affidavit is good and cannot be set aside on certiorari because of a defective affidavit. Bogle v. State, 155 Miss. 612, 125 So. 99 (1929).

2. Venue.

In view of this section [Code 1942, § 1412], a fraternal benefit association may be sued in the chancery court of the county in which the beneficiary resides. Masonic Benefit Ass'n v. Dotson, 111 Miss. 60, 71 So. 266 (1916).

3. Dismissal.

Where a suit was brought in chancery court for cancelation of a conveyance on the ground that it has never been delivered, the chancellor should have granted

the complainant's motion for voluntary dismissal without prejudice where there was no submission to the chancellor for final decision on merits. *Graham v. Graham*, 214 Miss. 99, 58 So. 2d 85 (1952).

A complainant in the chancery court has the right under the statute to dismiss his suit without prejudice. This rule applies in all cases where the defendant will not be prejudiced by a dismissal. *Adams v. Lucedale Com. Co.*, 113 Miss. 608, 74 So. 435 (1917); *Adams v. Dean*, 74 So. 436 (Miss. 1917); *Adams v. Leatherbury*, 74 So. 436 (Miss. 1917); *Adams v. McInnis*, 74 So. 436 (Miss. 1917).

4. Evidence.

Under the provisions of this section [Code 1942, § 1412], Code 1942, § 1469 is

applicable to suits in the chancery court. *General Acceptance Corp. v. Holbrook*, 254 Miss. 78, 179 So. 2d 845 (1965).

In action of unlawful entry and detainer, introduction in evidence of deed to plaintiff held not objectionable on ground that no copy of deed was filed as exhibit to declaration, since statute (Code 1930, § 3458) made no such requirement. *Huff v. Murray*, 171 Miss. 656, 158 So. 475 (1935).

Statutes requiring copy of writing to be annexed to declaration or bill before evidence of writing may be introduced applies to chancery court as well as to circuit court. *Thomas v. B. Rosenberg & Sons*, 153 Miss. 314, 120 So. 732 (1929).

RESEARCH REFERENCES

ALR. Pleading and proof of law of foreign country. 75 A.L.R.3d 177.

Am Jur. 20 Am. Jur. 2d, Courts §§ 35 et seq.

CJS. 21 C.J.S., Courts §§ 135-177.

Law Reviews. The Limits of the Mississippi Supreme Court's Rule-Making Authority. 60 Miss. L. J. 359, Fall 1990.

§ 11-7-3. Assignee of chose in action may sue.

The assignee of any chose in action may sue for and recover on the same in his own name, if the assignment be in writing. In case of a transfer or an assignment of any interest in such chose in action before or after suit brought, the action may be begun, prosecuted and continued in the name of the original party, or the court may allow the person to whom the transfer or assignment of such interest has been made, upon his application therefor, to be substituted as a party plaintiff in said action. If in any case a transfer or assignment of interest in any demand or chose in action be made in writing before or after suit is filed, to an attorney or firm of attorneys, appearing in the case, it shall be sufficient notice to all parties of such assignment or transfer, if such assignment or transfer be filed with the papers in said cause, and such attorney or attorneys shall not be required to be made parties to said suit. An "assignee" for purposes of this section includes both absolute assignees, with or without recourse, and conditional or limited assignees including assignees for collection purposes.

SOURCES: Laws, 1916, ch. 134; Codes, Hemingway's 1917, § 497; Laws, 1930, § 505; Laws, 1942, § 1448; Laws, 2001, ch. 359, § 1, eff from and after July 1, 2001.

Cross References — Benefits carried with assignment of negotiable instruments, see § 75-13-1.

Effect of releasing one or more joint debtors, see § 85-5-1.

Provision that no action shall be dismissed on ground that it is not prosecuted in name of real party in interest until reasonable time has been allowed after objection for ratification of commencement of action by, or joinder or substitution of, real party in interest, see Miss. R. Civ. P. 17.

Substitution of parties generally, see Miss. R. Civ. P. 25.

JUDICIAL DECISIONS

1. In general.
2. Rights assignable.
3. Assignment to attorney.
4. Necessity of assignment in writing.
5. Suit by or in the name of assignor.
6. Right of assignee to sue.
7. Assignment pendente lite.
8. Rights of assignor and assignee inter se.
9. Payment or settlement of claim after assignment.
10. Evidence.
11. Parties.
12. Limitation of actions.

1. In general.

Pursuant to a divorce, the property settlement agreement provided that each party released the other party from all claims through the date of the agreement, and referenced civil or criminal actions; the agreement was an appropriate location for a release of claims to appear, the claims that were the subject of the agreement were "choses in action," and the trial court properly held that the contractual agreement precluded the wife's suit for personal injuries based on a pre-divorce assault by the husband. *Martinez v. Martinez*, 860 So. 2d 1247 (Miss. Ct. App. 2003).

In a cause of action based upon an open account for merchandise sold and delivered by the receiver of a bankrupt company to the defendant, where the declaration alleges that there was proper assignment under the authority of a proper decree of a chancery court, the failure of the plaintiff to file a copy of the order appointing the receiver and a copy of order authorizing sale of assets of the bankrupt company receivership to the plaintiff, with the declaration, does not constitute such a defect as to require a reversal of a default judgment. *Britton v. Magnolia State Casket & Supply Co.*, 210 Miss. 264, 49 So. 2d 404 (1950).

Statute regarding right of assignee of chose in action to sue in his own name held not applicable to suits in equity to enforce right of subrogation. *Box v. Early*, 181 Miss. 19, 178 So. 793 (1938).

Statute (Code 1942, § 1450), requiring that assignment of chose in action be in writing, filed with papers, held not in conflict with this section [Code 1942, § 1448] authorizing institution or continuance of action in assignor's name. *Solomon v. Continental Baking Co.*, 174 Miss. 890, 166 So. 376 (1936).

2. Rights assignable.

Trial court did not err in failing to recognize and apply the waiver, joinder and assignment documents signed by a mother's children regarding her claims for child support arrearages on their behalves because although Miss. Code Ann. § 11-7-3 allowed for the assignment of choses in action, the child support benefits belonged to the children with the mother serving only in a fiduciary capacity. *Ladner v. Logan*, 857 So. 2d 764 (Miss. 2003).

Because a wrongful death claim accrued at death, a decedent could not have assigned it — or the personal injury component of the wrongful death claim that survived her death pursuant to Miss. Code Ann. § 11-7-13 — to her ex-husband under Miss. Code Ann. § 11-7-3. *England v. England*, 846 So. 2d 1060 (Miss. Ct. App. 2003).

A claim against an insurance company for bad faith is assignable. *Kaplan v. Harco Nat'l Ins. Co.*, 708 So. 2d 89 (Miss. Ct. App. 1998), subst. op., 716 So. 2d 673 (Miss. Ct. App. 1998), cert. denied, 726 So. 2d 594 (Miss. 1998).

Holder of mortgage on property destroyed by fire could properly assign its interest in any claims and/or causes of action against insurance company arising out of loss to the property owner, with

property owner remaining fully liable to mortgagee for amount still owed on mortgage, and such assignment is not champertous, as property owners who obtain assignment from mortgage company are not strangers to litigation against insurance company and have asserted interest separate and distinct from interest of mortgagee; in issues of propriety of assignment and claims of champerty, analysis is not focused on relationship between assignee and assignor but rather relationships between assignor and insurance company and assignees and insurance company. *Stephen R. Ward, Inc. v. United States Fid. & Guar. Co.*, 681 F. Supp. 389 (S.D. Miss. 1988).

Under this provision, a cause of action for personal injuries may be assigned in part, and no unjust enrichment is involved in permitting recovery in excess of the amount due the assignee. *Farmer v. Humphreys County Mem. Hosp.*, 236 Miss. 35, 109 So. 2d 356 (1959).

The right of a borrower in case of usury to recover the principal and interest is not assignable. *Fry v. Layton*, 191 Miss. 17, 2 So. 2d 561, 134 A.L.R. 1330 (1941).

Landowner's right to recover for cutting timber is assignable; deed conveying land with all rights of action accrued or to accrue, for depredation and trespasses, assigned right of action for wrongful cutting timber prior thereto. *J.H. Leavenworth & Son v. Hunter*, 150 Miss. 245, 116 So. 593 (1928).

Action for recovery of personal property or to enforce contract or recover damages for breach of contract or for injury to person or property survives, and is assignable; pure penalty intended as punishment for misconduct does not survive, and is not assignable. *J.H. Leavenworth & Son v. Hunter*, 150 Miss. 245, 116 So. 593 (1928).

An injured person may assign his claim for damages. *Reese v. Salmon*, 99 So. 382 (Miss. 1924).

The vendor of standing timber, acquiescing in the assignment of the contract of sale thereof, is estopped to deny the assignability of a claim. *Young v. Adams*, 122 Miss. 1, 84 So. 1 (1920).

A valid claim for personal injuries may be assigned. *Wells v. Edwards Hotel & City Ry.*, 96 Miss. 191, 50 So. 628 (1909).

The right given to nonresident defendants against whom a final decree has been rendered to apply for a new hearing within two years is assignable and may be exercised by the assignee. *Fink v. Henderson*, 74 Miss. 8, 19 So. 892 (1896).

A covenant not to re-engage in the insurance business is assignable and may be enforced by the assignee. *Klein v. Buck*, 73 Miss. 133, 18 So. 891 (1895).

3. Assignment to attorney.

Where an attorney who, under a contract with his client, had obtained an assignment of a 50 per cent interest in the client's cause of action against the defendant, or a 50 per cent contingent fee in the amount that might be recovered therein, had failed to file his contract in compliance with this section [Code 1942, § 1448], and in an action upon the alleged assignment, defendant, who had obtained a written settlement and release from the client, answered he had no knowledge of the contract between the attorney and the client at the time of his settlement with the client, the trial court properly sustained defendant's plea in bar, in view of ample evidence to support the finding as to the absence of knowledge on the defendant's part at the time of the release. *Cumbest v. Kaufman*, 230 Miss. 713, 93 So. 2d 857 (1957).

Absent assignment to attorneys of interest in cause of action, complainant in good faith may dismiss suit without attorneys' consent, notwithstanding attorneys' fee is contingent. *Zerkowsky v. Zerkowsky*, 160 Miss. 278, 131 So. 647 (1931).

4. Necessity of assignment in writing.

Real party in interest was company which had allegedly sold its stock to another company, and not company purchasing stock, where, other than proposal to buy stock and order of bankruptcy court accepting such proposal, no document evidencing sale or transfer of assets was executed between selling and purchasing companies. *J. Morco, Inc. v. Prentiss Mfg. Co.*, 675 F. Supp. 1039 (S.D. Miss. 1987).

The equitable holder of a chose in action, to whom a written assignment is not made, cannot sue in his own name. *M. Lowenburg & Co. v. Jones*, 56 Miss. 688, 31 Am. R. 379 (1879).

5. Suit by or in the name of assignor.

Court's order allowing insurers, which had made payments to the insured for loss under a contract subrogating them pro tanto to insured's claim for damages, to be made parties in insured's action for damages caused by the alleged negligent installation of gas heating appliance in no way interfered with insured's right to maintain action where none of the insurers filed pleadings attacking insurer's right, and only action taken by insurers' counsel was on the side of, and in aid of insured's cause and with his full consent and approval. *Ford v. United Gas Corp.*, 254 F.2d 817 (5th Cir. 1958), cert. denied, 358 U.S. 824, 79 S. Ct. 40, 3 L. Ed. 2d 64 (1958).

Assignment of conditional sales contracts to a bank as collateral, held not to preclude the assignor from suing thereon. *Murdock Acceptance Corp. v. Adcox*, 245 Miss. 151, 138 So. 2d 890 (1962).

Insurance companies, assignees of the insured's cause of action, by bringing the action in the name of the assignor for damages resulting from the defendant's alleged negligence in improperly installing a floor furnace in the insured's home, elected to proceed in the name of the assignor, so that the trial court properly refused to permit plaintiff's attorneys to impeach the assignor. *Toler v. Owens*, 231 Miss. 753, 97 So. 2d 728 (1957).

Where suit by former sheriff against the county for fees alleged to be past due and owing him and the county made a counterclaim against the former sheriff and the suit was dismissed by agreement of the parties and without prejudice to either the claim of the former sheriff or the counterclaim of the county, and where later the former sheriff assigned his claim to an accountant, the order of dismissal was binding upon the former sheriff and nonprejudicial to the accountant's rights as assignee to thereafter prosecute a suit in his own name. *Smith v. Covich County*, 219 Miss. 633, 69 So. 2d 404 (1954).

Under this section [Code 1942, § 1448], court is correct in permitting action brought in name of wife on hospitalization policy to proceed in her name after re-opening of case to permit husband, to whom she had made assignment, to state

that he authorized her to bring suit in her name and waived all his rights under assignment. *American Life Ins. Co. v. Walker*, 208 Miss. 1, 43 So. 2d 657 (1949).

Where surety company on fidelity bond paid credit association amount of loss occasioned by dishonesty of association's employee in forging indorsements on checks and drafts issued by such association on drawee-depository bank, and association assigned its rights to the surety, and at the request of the surety brought suit against the bank, suit could be instituted and prosecuted in the name of the association but the suit was entirely for the benefit of the surety. *Oxford Prod. Credit Ass'n v. Bank of Oxford*, 196 Miss. 50, 16 So. 2d 384 (1944).

Where surety on fidelity bond paid credit association amount of loss occasioned by forgery of association's employee in the indorsement of checks and drafts issued by such association upon drawee bank, and association assigned its rights to surety, action in name of association against bank, to which bank set up equitable defenses, was properly removed to chancery court, and when so transferred, proof of all equities and the effect thereof could properly be made and considered. *Oxford Prod. Credit Ass'n v. Bank of Oxford*, 196 Miss. 50, 16 So. 2d 384 (1944).

A liquidating committee of a bank, vested with authority under decree of the chancery court to sue for and collect the indebtednesses due such bank, could maintain an action to collect a debt due the bank represented by promissory notes collaterally secured by corporate stock notwithstanding that such notes and collateral security had been assigned by the bank to the Reconstruction Finance Corporation, in view of the fact that the bank, as payee of such promissory note, was the original party entitled to sue on the note within the meaning of this section [Code 1942, § 1448]. *Morrison v. Gulf Oil Corp.*, 189 Miss. 212, 196 So. 247 (1940).

Order to amend declaration in tort action by bringing in corporation, to which plaintiff assigned right of action before bringing suit, as party thereto, and dismissal of suit for noncompliance with such order, held erroneous. *Solomon v. Continental Baking Co.*, 174 Miss. 890, 166 So. 376 (1936).

Where the assignee brings suit in the name of the assignor, the suit may be prosecuted in the name of the assignor, or it can be by order of the court prosecuted in the name of the assignee as substituted plaintiff. *Bolivar Compress Co. v. Mallett*, 139 Miss. 213, 104 So. 79 (1925).

Suits may be brought, maintained and appealed in the name of the assignor under this section [Code 1942, § 1448]. *Ridgeway v. Jones*, 122 Miss. 624, 84 So. 692 (1920).

In a suit by one person for the use of another, recovery can only be had on the cause of action, the legal title to which is in the plaintiff. Where, under this section [Code 1942, § 1448] the usee is substituted for the plaintiff the extent to which the recovery may be had is not enlarged. *Yazoo & Miss. V. Ry. v. S.B. Wilson & Co.*, 83 Miss. 224, 35 So. 340 (1903).

In actions of tort, usees have no rights that entitle them to recognition as parties litigant, but proof of right in the nominal plaintiff entitles him to a recovery. *Jones v. Kansas City, M. & B.R. Co.*, 75 Miss. 913, 23 So. 547 (1898).

A bailor whose warehouse receipts are pledged cannot maintain replevin or trover either in his own name or for the use of the pledgee. *Selleck v. Macon Compress & Whse. Co.*, 72 Miss. 1019, 17 So. 603 (1895).

An action for damages against a railroad company for killing animals should not be brought in the name of one for the use of another, since in tort actions there cannot be a usee. *Kansas City, M. & B.R. Co. v. Cantrell*, 70 Miss. 329, 12 So. 344 (1893).

A plaintiff suing on several demands, one of which is held by verbal assignment from a partnership, may amend so as to proceed in the name of the partnership, as to that, and dismiss as to the other claims. *Shannon v. Rester*, 69 Miss. 238, 13 So. 587 (1891).

An assignor in writing of an account cannot sue in his own name for the use of the assignee. *Beck v. Rosser*, 68 Miss. 72, 8 So. 259 (1890).

6. Right of assignee to sue.

In an action by a savings and loan association against a former vice-president and members of the board of direc-

tors for \$26 million dollars in damages for alleged breach of fiduciary duty in the management of the association, the trial court properly rejected the defendants' contention that the suit was barred due to the acquisition of the association by a successor corporation where the written bill of sale and assignment had the effect of transferring and assigning unto the successor corporation all properties, assets and choses in action of every kind and nature, including the present action. *Liberty Sav. & Loan Ass'n v. Mitchell*, 398 So. 2d 208 (Miss. 1981).

A "subrogation receipt" taken by an insurer upon settling with insured for damage caused by a third person is such an assignment of insured's right of action as to permit the insurer to bring suit thereon. *United States Fid. & Guar. Co. v. Covert*, 242 Miss. 1, 133 So. 2d 403 (1961).

Under this section [Code 1942, § 1448], public accountant has right to contract with public official for prosecution of suit for additional salary, in consideration of percentage of recovery, and the suit may be prosecuted in the name of the latter as assignee. *Calhoun County v. Cooner*, 152 Miss. 100, 118 So. 706 (1928).

Liquidating agent authorized to effect settlement of debts, etc., by agreement between bank, creditors, and state banking department could sue on note payable to bank or bearer. *Yazoo Delta Mtg. Co. v. Harlow*, 150 Miss. 105, 116 So. 441 (1928).

A contract for the sale of timber is enforceable against the vendor by the assignee of the vendee. *Young v. Adams*, 122 Miss. 1, 84 So. 1 (1920).

Plaintiff must have title to a chose in action at the time he brings suit; so where assignment of the right of action on a fire insurance policy was not made to plaintiff until after he brought suit thereon, the action could not be maintained. *St. Paul Fire & Marine Ins. Co. v. W.H. Daniel Auto Co.*, 121 Miss. 745, 83 So. 807 (1920).

Where a carrier by mistake delivers partnership property to a stranger and pays the partnership for it, receiving an assignment from one only of the partners of his interest therein, it may sue the stranger for the value of the property, notwithstanding the failure of the other partners to join in the assignment. *John-*

son, *Nesbitt & Co. v. Gulf & Chicago R. Co.*, 82 Miss. 452, 34 So. 357 (1903).

And in such case the carrier may sue in trover or waive the tort and sue for the value of the property without an assignment from the owner. *Johnson, Nesbitt & Co. v. Gulf & Chicago R. Co.*, 82 Miss. 452, 34 So. 357 (1903).

The assignee may sue in his own name if the assignment be in writing, though another may possess a beneficial interest in the money due. *Jenkins v. Sherman*, 77 Miss. 884, 28 So. 726 (1900).

This section [Code 1942, § 1448], gives to assignees of grantors in fee, and to the assignees of covenants expressed in conveyances in fee, the like remedies for the estate assigned and upon the conditions and covenants contained in them that the common law gave to the original parties and their privies in contract. *Wright v. Hardy*, 76 Miss. 524, 24 So. 697 (1899).

Where the seller, by separate written contract, reserves the legal title as security for a note for the purchase price, the assignee of the note may enforce the contract as a security. *Ross-Meehan Brake-Shoe Foundry Co. v. Pascagoula Ice Co.*, 72 Miss. 608, 18 So. 364 (1895).

But the right is purely defensive unless the assignment be in writing. *Pollard v. Thomas*, 61 Miss. 150 (1883).

The person to whom a claim for damages for injury to personal property has been assigned in writing can sue thereon, in his own name. *Chicago, St. L. & N.O.R. Co. v. Packwood*, 59 Miss. 280 (1881).

7. Assignment pendente lite.

In an action by an assignor in the circuit court, after transfer from the chancery court, for reimbursement for the default in the account of an insurance agent guaranteed by bond, the assignment having been made while the suit was pending in the chancery court, the assignee was entitled to prove the payment of the consideration for such assignment on the trial of the suit in the circuit court maintained in the name of the assignor. *Jenkins & Boyle v. Rogers*, 184 Miss. 182, 185 So. 603 (1939).

A plaintiff bringing a suit which is thereafter merged into other parties does not entitle defendant to a verdict in the

case. *Central Nat'l Bank v. Perry*, 135 Miss. 445, 100 So. 276 (1924).

It is no defense that the cause of action has been assigned since the beginning of the suit, and is still prosecuted in the name of the assignor. *Montgomery v. Handy*, 63 Miss. 43 (1885).

8. Rights of assignor and assignee inter se.

A mortgage may be assigned but after the assignment the mortgagee has no authority to enter satisfaction thereon. *Brown v. Yarbrough*, 130 Miss. 715, 94 So. 887 (1923).

The rights of the assignee cannot be affected by subsequent acts of the assignor. *Peck-Hammond Co. v. Williams*, 77 Miss. 824, 27 So. 995 (1900).

9. Payment or settlement of claim after assignment.

A party is not protected in paying a claim which he knows has been assigned to another person unless he makes the payment to the person who owns it. *Wells v. Edwards Hotel & City Ry.*, 96 Miss. 191, 50 So. 628 (1909).

10. Evidence.

Where the nominal plaintiff assigns the cause of action pending the suit to the usee, evidence of an independent antecedent contract between the defendant and the usee is not admissible. *Yazoo & Miss. V. Ry. v. S.B. Wilson & Co.*, 83 Miss. 224, 35 So. 340 (1903).

11. Parties.

Suit at law on chose in action must be brought in the name of legal owner, but in equity equitable owner may be joined. *Cottrell v. Smith*, 146 Miss. 837, 112 So. 465 (1927).

The assignee of part of a claim is a necessary party to a suit for personal injuries to the assignor. *A.K. McInnis Lumber Co. v. Rather*, 111 Miss. 55, 71 So. 264 (1916).

12. Limitation of actions.

Amendment to action by assignee to include assignor creates no new cause of action for consideration in determining limitations. *Cottrell v. Smith*, 146 Miss. 837, 112 So. 465 (1927).

RESEARCH REFERENCES

Am Jur. 6 Am. Jur. 2d, Assignments §§ 176-195.

2 Am. Jur. Pl & Pr Forms (Rev), Assignments, Forms 71-77 (Parties to actions; substitution).

2 Am. Jur. Legal Forms 2d, Assignments §§ 25:131 et seq. (choses in action; assignments arising out of contract); §§ 25:151 et seq. (choses in action; assignments arising out of tort).

CJS. 6 C.J.S., Assignments §§ 103-126.

Law Reviews. Symposium on Mississippi Rules of Civil Procedure: Joinder of Claims and Parties — Rules 13, 14, 17 and 18. 52 Miss. L. J. 37, March 1982.

1981 Mississippi Supreme Court Review; Insurance. 52 Miss. L. J. 445, June 1982.

§ 11-7-5. Assignee's action not prejudicial by set-off.

A setoff or other defense existing under Section 11-7-3 at the time of or before notice of the assignment shall not be prejudiced thereby.

SOURCES: Codes, 1857, ch. 61, art. 42; 1871, § 670; 1880, § 1507; 1892, § 660; Laws, 1906, § 717; Hemingway's 1917, § 496; Laws, 1930, § 506; Laws, 1942, § 1449.

Cross References — Limitation of setoff, see § 15-1-71.

Defenses available with assignment of negotiable instruments, see § 75-13-1.

JUDICIAL DECISIONS

1. In general.

Assignment of claim against county for purchase price of tractor sold was valid without consent of county, though there was element of guaranty or warranty. *People's Bank v. Attala County*, 156 Miss. 560, 126 So. 192 (1930).

Defendant, after assignee of account was substituted as plaintiff, was not entitled to recover over against him on counterclaim. *Graham v. Stewart*, 152 Miss. 307, 120 So. 171 (1929).

Assignee of account could not, after defendant in action thereon filed setoff, be substituted as plaintiff over objection. *Graham v. Stewart*, 152 Miss. 307, 120 So. 171 (1929).

A judgment cannot be set off against another judgment so as to satisfy that part of it equitably assigned to the attorneys as compensation for their services in recovering it. *Harris v. Hazlehurst Oil-Mill & Mfg. Co.*, 78 Miss. 603, 30 So. 273 (1901).

And this is true, though the assignment of the account was not in writing. *Ashby v. Carr*, 40 Miss. 64 (1866); *Hunt & Vaughan v. Shackleford*, 55 Miss. 94 (1877).

In a suit by an indorsee of a note against the maker, the latter will be entitled to use a setoff on open account which was acquired by assignment before suit. *Phipps v. Shegogg*, 30 Miss. 241 (1855).

RESEARCH REFERENCES

Am Jur. 6 Am. Jur. 2d, Assignments §§ 188, 189.

CJS. 6 C.J.S., Assignments § 132.

§ 11-7-7. Transfer of chose in action after filing.

Any chose in action or any interest therein, after suit has been filed thereon, may be sold or assigned the same as other property, whether such

claim or any interest therein was heretofore assignable under the laws of this state or not. Such sale shall be evidenced by writing signed and acknowledged by the party making the same, which shall be filed with the papers of such suit. After such filing, it shall be the duty of the clerk, in whose office such papers are kept, to make a minute of such sale or transfer on the trial docket where the suit is entered, giving briefly the substance thereof, for which he shall be entitled to a fee of Twenty-five Cents (25¢), to be paid by the party applying therefor. Such transfer when so made and dealt with shall be valid and binding upon all persons thereafter dealing with such claim, whether they have actual notice thereof or not.

SOURCES: Laws, 1902, ch. 69; Codes, 1906, § 718; Hemingway's 1917, § 498; Laws, 1930, § 507; Laws, 1942, § 1450; Laws, 1991, ch. 573, § 19, eff from and after July 1, 1991.

Cross References — Executions and attachments on choses in action, see §§ 13-3-127, 13-3-133, 13-3-135, 13-3-147.

Assignments generally, see § 75-13-1.

JUDICIAL DECISIONS

1. In general.
2. Bad faith claim against insurance company.

1. In general.

The right to sue for trespass to property was assignable to a subsequent purchaser of property, such that the grantee had the same rights as the prior owner; absent some other doctrine, buyers could bring suit for the claim originally possessed by the railroad. *Flowers v. McCraw*, 792 So. 2d 339 (Miss. Ct. App. 2001).

Attorney who, under oral contract for contingent fee, prosecuted suit for unliquidated damages to judgment and received from client, filed in the cause, an assignment in writing of that interest in the judgment, had a superior interest in judgment and took precedence to judgment debtor's claim of right of setoff, although at the time suit was commenced and when judgment was rendered, attorney's client was indebted to defendant in such suit in a larger sum than his judgment. *Stribling Motor Co. v. Smith*, 195 Miss. 547, 15 So. 2d 364 (1943).

This section [Code 1942, § 1450], requiring that assignment of chose in action be in writing, filed with papers, held not in conflict with Code 1942, § 1448, authorizing institution or continuance of action in

assignor's name or substitution of assignee as plaintiff on his application. *Solomon v. Continental Baking Co.*, 174 Miss. 890, 166 So. 376 (1936).

Landowner's right to recover for cutting timber is assignable; deed conveying land with all rights of action accrued or to accrue, for depredation and trespasses, assigned right of action for wrongful cutting timber prior thereto. *J.H. Leavenworth & Son v. Hunter*, 150 Miss. 245, 116 So. 593 (1928).

Satisfaction of judgment for damage to contents of building is bar to other action by same person for damage to buildings from same negligent act, though plaintiff had assigned his interest in second action, where notice of assignment was not given or filed as required by this section [Code 1942, § 1450]. *Fewell v. New Orleans & N.E.R. Co.*, 144 Miss. 319, 109 So. 853 (1926).

This statute [Code 1942, § 1450] does not apply to the assignment of a judgment but applies to assignment before judgment. *Pigford Grocery Co. v. Wilder*, 116 Miss. 233, 76 So. 745 (1917).

2. Bad faith claim against insurance company.

A claim against an insurance company for bad faith is assignable. *Kaplan v.*

Harco Nat'l Ins. Co., 708 So. 2d 89 (Miss. Ct. App. 1998), subst. op., 716 So. 2d 673 (Miss. Ct. App. 1998), cert. denied, 726 So. 2d 594 (Miss. 1998).

RESEARCH REFERENCES

Am Jur. 6 Am. Jur. 2d, Assignments §§ 107-115.

2 Am. Jur. Pl & Pr Forms (Rev), Assign-

ments, Forms 71-77 (Parties to actions; substitution).

CJS. 6 C.J.S., Assignments §§ 103-126.

§ 11-7-9. Action for seduction of a woman.

An unmarried female may prosecute an action for her own seduction, and recover damages.

SOURCES: Codes, 1880, § 1508; 1892, § 661; Laws, 1906, § 719; Hemingway's 1917, § 499; Laws, 1930, § 508; Laws, 1942, § 1451.

Cross References — Crime of seduction, see § 97-29-55.

RESEARCH REFERENCES

Am Jur. 47 Am. Jur., Seduction § 80.

70 Am. Jur. 2d, Seduction § 60.

CJS. 79 C.J.S., Seduction §§ 4-7.

Law Reviews. Symposium on Mississippi Rules of Civil Procedure: Rules 4, 5, 7-11, and 15. 52 Miss. L. J. 3, March 1982.

§ 11-7-11. Action for seduction of a child.

A parent may bring an action for the seduction of a child, although such child be not living with nor in the service of the plaintiff, and though there be no loss of service; but a recovery by the parent or child shall bar any other action for the same cause.

SOURCES: Codes, 1880, § 1509; 1892, § 662; Laws, 1906, § 720; Hemingway's 1917, § 500; Laws, 1930, § 509; Laws, 1942, § 1452; Laws, 1988, ch. 413, eff from and after passage (approved April 23, 1988).

Cross References — Crime of seduction, see § 97-29-55.

JUDICIAL DECISIONS

1. In general.

Father was entitled to damages for humiliation and wounded feelings caused by seduction of daughter. *Stone v. Bang*, 153 Miss. 892, 122 So. 95 (1929).

Defendant was guilty of seduction, if

female between twelve and eighteen consented to sexual intercourse as result of defendant's promise to give her money, clothes, etc. *Stone v. Bang*, 153 Miss. 892, 122 So. 95 (1929).

RESEARCH REFERENCES

- Am Jur.** 59 Am. Jur. 2d, Parent and Child §§ 135 et seq.
 70 Am. Jur. 2d, Seduction §§ 60-66.
 22 Am. Jur. Pl & Pr Forms (Rev), Seduction, Forms 3-6 (Complaint, petition, or declaration for seduction in action by father or mother).
CJS. 86 C.J.S., Seduction § 88.

§ 11-7-12. Civil penalty recoverable for violation of bad check statute.

(1) If a check, draft or order is made, drawn, issued, uttered or delivered in violation of Section 97-19-55, the payee, endorser or his assignee shall be entitled to collect, in addition to the face amount of the check, draft or order, a service charge of Forty Dollars (\$40.00).

(2) In any civil action founded on a check, draft or order made, drawn, issued, uttered or delivered in violation of Section 97-19-55, the plaintiff, if he be a payee or endorser, shall be entitled to recover, in addition to the face amount of the check, draft or order, damages in the following amount:

(a) If the amount of the check, draft or order is up to and including Twenty-five Dollars (\$25.00), then the additional damages shall be Thirty Dollars (\$30.00);

(b) If the amount of the check, draft or order is above Twenty-five Dollars (\$25.00) and up to and including Two Hundred Dollars (\$200.00), then the additional damages shall be fifty percent (50%) of the amount of the check, draft or order, not to exceed Fifty Dollars (\$50.00), and not to be less than Thirty Dollars (\$30.00);

(c) If the amount of the check, draft or order is above Two Hundred Dollars (\$200.00); then the additional damages shall be twenty-five percent (25%) of the amount of the check, draft or order; and

(d) No service charge shall be payable in a civil action under this section.

SOURCES: Laws, 1976, ch. 454; Laws, 2000, ch. 364, § 1; Laws, 2004, ch. 374, § 2, eff from and after July 1, 2004.

Amendment Notes — The 2004 amendment substituted “service charge of Forty Dollars (\$40.00)” for “service charge of Thirty Dollars (\$30.00)” at the end of (1).

Cross References — Duty to establish accounts to facilitate handling of bad checks paid into the state treasury, see § 7-9-12.

Bad checks generally, see §§ 97-19-55 et seq.

JUDICIAL DECISIONS

1. Fraudulent Intent Requirement.

In wife's contempt action against former husband, the wife presented no evidence that the husband issued the checks for child support, which the wife did not present to the bank for months, with

fraudulent intent; therefore, there was no justification for the chancellor to award any statutory damages under Miss. Code Ann. § 11-7-12 regarding the checks that were returned for insufficient funds, and for which the husband's efforts to make

good on the amounts were rebuffed by the wife. *Broome v. Broome*, 832 So. 2d 1247 (Miss. Ct. App. 2002).

ATTORNEY GENERAL OPINIONS

A tax collector, or a tax assessor and tax collector, may use the provisions of the statute to collect a bad check and obtain a civil penalty therefor. Ross, May 15, 1998, A.G. Op. #98-0261.

RESEARCH REFERENCES

ALR. Constitutionality of “bad check” statute. 16 A.L.R.4th 631.

§ 11-7-13. Actions for injuries producing death.

Whenever the death of any person or of any unborn quick child shall be caused by any real, wrongful or negligent act or omission, or by such unsafe machinery, way or appliances as would, if death had not ensued, have entitled the party injured or damaged thereby to maintain an action and recover damages in respect thereof, or whenever the death of any person or of any unborn quick child shall be caused by the breach of any warranty, express or implied, of the purity or fitness of any foods, drugs, medicines, beverages, tobacco or any and all other articles or commodities intended for human consumption, as would, had the death not ensued, have entitled the person injured or made ill or damaged thereby, to maintain an action and recover damages in respect thereof, and such deceased person shall have left a widow or children or both, or husband or father or mother, or sister, or brother, the person or corporation, or both that would have been liable if death had not ensued, and the representatives of such person shall be liable for damages, notwithstanding the death, and the fact that death was instantaneous shall in no case affect the right of recovery. The action for such damages may be brought in the name of the personal representative of the deceased person or unborn quick child for the benefit of all persons entitled under the law to recover, or by widow for the death of her husband, or by the husband for the death of the wife, or by the parent for the death of a child or unborn quick child, or in the name of a child, or in the name of a child for the death of a parent, or by a brother for the death of a sister, or by a sister for the death of a brother, or by a sister for the death of a sister, or a brother for the death of a brother, or all parties interested may join in the suit, and there shall be but one (1) suit for the same death which shall ensue for the benefit of all parties concerned, but the determination of such suit shall not bar another action unless it be decided on its merits. Except as otherwise provided in Section 11-1-69, in such action the party or parties suing shall recover such damages allowable by law as the jury may determine to be just, taking into consideration all the damages of every kind to the decedent and all damages of every kind to any and all parties interested in the suit.

This section shall apply to all personal injuries of servants and employees received in the service or business of the master or employer, where such injuries result in death, and to all deaths caused by breach of warranty, either express or implied, of the purity and fitness of foods, drugs, medicines, beverages, tobacco or other articles or commodities intended for human consumption.

Any person entitled to bring a wrongful death action may assert or maintain a claim for any breach of expressed warranty or for any breach of implied warranty. A wrongful death action may be maintained or asserted for strict liability in tort or for any cause of action known to the law for which any person, corporation, legal representative or entity would be liable for damages if death had not ensued.

In an action brought pursuant to the provisions of this section by the widow, husband, child, father, mother, sister or brother of the deceased or unborn quick child, or by all interested parties, such party or parties may recover as damages property damages and funeral, medical or other related expenses incurred by or for the deceased as a result of such wrongful or negligent act or omission or breach of warranty, whether an estate has been opened or not. Any amount, but only such an amount, as may be recovered for property damage, funeral, medical or other related expenses shall be subject only to the payment of the debts or liabilities of the deceased for property damages, funeral, medical or other related expenses. All other damages recovered under the provisions of this section shall not be subject to the payment of the debts or liabilities of the deceased, except as hereinafter provided, and such damages shall be distributed as follows:

Damages for the injury and death of a married man shall be equally distributed to his wife and children, and if he has no children all shall go to his wife; damages for the injury and death of a married woman shall be equally distributed to the husband and children, and if she has no children all shall go to the husband; and if the deceased has no husband or wife, the damages shall be equally distributed to the children; if the deceased has no husband, nor wife, nor children, the damages shall be distributed equally to the father, mother, brothers and sisters, or such of them as the deceased may have living at his or her death. If the deceased have neither husband, nor wife, nor children, nor father, nor mother, nor sister, nor brother, then the damages shall go to the legal representative, subject to debts and general distribution, and the fact that the deceased was instantly killed shall not affect the right of the legal representative to recover. All references in this section to children shall include descendants of a deceased child, such descendants to take the share of the deceased child by representation. There shall not be, in any case, a distinction between the kindred of the whole and half blood of equal degree. The provisions of this section shall apply to illegitimate children on account of the death of the mother and to the mother on account of the death of an illegitimate child or children, and they shall have all the benefits, rights and remedies conferred by this section on legitimates. The provisions of this section shall apply to illegitimate children on account of the death of the natural father

and to the natural father on account of the death of the illegitimate child or children, and they shall have all the benefits, rights and remedies conferred by this section on legitimates, if the survivor has or establishes the right to inherit from the deceased under Section 91-1-15.

Any rights which a blood parent or parents may have under this section are hereby conferred upon and vested in an adopting parent or adopting parents surviving their deceased adopted child, just as if the child were theirs by the full blood and had been born to the adopting parents in lawful wedlock.

SOURCES: Codes, 1857, ch. 61, art. 48; 1871, § 676; 1880, § 1510; 1892, § 663; Laws, 1906, § 721; Laws, 1908, ch. 167; Hemingway's 1917, § 501; Laws, 1922, ch. 229; Laws, 1930, § 510; Laws, 1942, § 1453; Laws, 1952, ch. 248; Laws, 1958, ch. 285, § 1; Laws, 1977, ch. 435; Laws, 1981, ch. 529, § 6; Laws, 1993, ch. 302, § 4; Laws, 2002, 3rd Ex Sess, ch. 4, § 11; Laws, 2004, ch. 515, § 1, eff from and after passage (approved May 4, 2004.)

Editor's Note — The 1958 amendment to Code 1942, § 1453, provides as follows:

"SECTION 3. This Act shall apply where the death occurs on or after the passage of this Act; it shall be immaterial that the rights conferred herein did not exist at the time of the adoption or were not conferred by the decree of adoption; and the adopting parent or adopting parents shall have and possess the rights and powers which have been added by this Act, automatically by the operation of law.

Laws, 1981, ch. 529, § 7, provides as follows:

"SECTION 7. Nothing in Section 6 of this act shall be construed as conferring any additional rights or remedies upon illegitimates in wrongful death actions concerning the death of a decedent which occurred prior to July 1, 1981."

Laws, 1993, ch. 302, § 5, effective July 1, 1993, provides as follows:

"SECTION 5. This act shall take effect and be in force from and after July 1, 1993. Procedural provisions of this act including subsections (1)(a), (b), (c) and (d) of Section 2 [§ 11-1-65] shall apply to all pending actions in which judgment has not been entered on the effective date of the act and all actions filed on or after the effective date of the act. All other provisions shall apply to all actions filed on or after July 1, 1994."

Amendment Notes — The 2002 amendment, 3rd Ex Sess, ch. 4, at the beginning of the last sentence of the first paragraph inserted "Except as otherwise provided in Section 11-1-69."

The 2004 amendment inserted "or of any unborn quick child" and "or unborn quick child" throughout the section.

Cross References — Constitutional authority for actions for death of employees, see Miss. Const. Art. 7, §§ 191, 193.

Liability of ships and vessels for wrongful death, see § 11-7-175.

Presumption of negligence in case of injury by railroads and motor vehicles, see § 13-1-123.

Limitation of action by personal representative of decedent, see § 15-1-55.

Exemption of damages for wrongful death from collection by hospital reimbursement commission, see § 41-7-95.

Period of retention of hospital records in case of wrongful death, see § 41-9-69.

Provisions of this section as effecting exception to what otherwise might constitute consequential damages, see § 75-2-715.

Liability of railroads for negligence and mismanagement, see §§ 77-9-435 et seq.

Exemption of judgment from execution for debt, see §§ 85-3-17, 85-3-19.

Effect of final decree of adoption, see § 93-17-13.

JUDICIAL DECISIONS

1. In general.
2. Right of action generally.
3. —Marital misconduct, as affected by.
4. —Enforcement of foreign cause of action.
5. Persons entitled to sue.
6. Persons entitled to recover.
7. Proximate cause.
8. Negligence and contributory negligence.
9. Limitation of actions.
10. Actions in general.
11. —Joinder of actions.
12. —Removal of cause.
13. Pleading.
14. Issues, proof and variance.
15. Parties.
16. Evidence.
17. Questions for jury.
18. Instructions.
19. Execution on judgment.
- 19.5. Attorney fees.
20. Damages.
21. —Elements of damages.
22. —Measure of damages.
23. —Amount of damages.
24. —Exemplary or punitive damages.
25. Compromise, settlement and release.
26. Res judicata.
27. Unborn child.
29. Adopted child.

1. In general.

In a wrongful death suit, as Miss. Code Ann. § 11-46-9(1)(m) applied to any non-intentional/non-criminal acts alleged to have been committed upon a deceased inmate by a sheriff and/or his deputies while in the course and scope of their employment, the trial court correctly dismissed claims alleging negligent acts by defendants and properly left an assault claim viable; however, it erred by dismissing other counts that alleged intentional criminal acts, as pursuant to Miss. Code Ann. §§ 11-46-5(2), 11-46-7(2), these claims remained viable under the wrongful death statute, Miss. Code Ann. § 11-7-13 (Supp. 2003). *Lee v. Thompson*, 859 So. 2d 981 (Miss. 2003).

Wrongful death statute should be given reading most coherent in principle, given entire statutory scheme and other valid

rules in field. *Fizer v. Davis*, 706 So. 2d 244 (Miss. 1998).

Wrongful death statute creates new and independent cause of action, unknown to common law, in favor of those named therein. *Penalver v. Howell*, 687 So. 2d 1171 (Miss. 1996), reh'g denied (Miss. Jan. 23, 1997).

In wrongful death action, there is no injury, and hence, no cause of action, until death occurs. *McMillan v. Puckett*, 678 So. 2d 652, 58 A.L.R.5th 917 (Miss. 1996), reh'g denied (Miss. Aug. 22, 1996).

Venue in wrongful death action alleging medical malpractice was proper either in county in which patient died some six months after allegedly negligent care was rendered, or in county in which that care was rendered. *McMillan v. Puckett*, 678 So. 2d 652, 58 A.L.R.5th 917 (Miss. 1996), reh'g denied (Miss. Aug. 22, 1996).

No statute provides for prejudgment interest on estimated earnings from time of decedent's death to time of trial, consequently, trial judge would have been correct in denying prejudgment interest on this basis alone, including § 11-7-13. *Smith v. Industrial Constructors, Inc.*, 783 F.2d 1249 (5th Cir. 1986).

Wrongful death statute is strictly construed on appellate review. *Pannell v. Guess*, 671 So. 2d 1310 (Miss. 1996).

On a factual showing that landowner neither did nor failed to do anything that breached any duty owed to the invitee, landowner was properly granted a directed verdict in action for the wrongful death of an experienced woodcutter whom he had hired to come onto his premises to fell trees and cut up firewood, and who was fatally injured in the felling of the first tree. *Hathorn v. Hailey*, 487 So. 2d 1342 (Miss. 1986).

Code 1972, § 11-7-13 must be considered in *pari materia* with Code 1972, §§ 91-7-231, 91-7-233, which authorize only a personal representative to sue to recover the assets of the deceased. *Thorn-ton v. Insurance Co. of N. Am.*, 287 So. 2d 262 (Miss. 1973).

Since the wrongful death statute created a cause of action unknown to the common law, it must be strictly construed.

Smith v. Garrett, 287 So. 2d 258 (Miss. 1973).

Mississippi's wrongful death statute which does not permit an illegitimate child to sue for or recover damages for the wrongful death of his father where the father has not acknowledged the child did not deny equal protection of the laws to an illegitimate son who had not been acknowledged by the deceased. Sanders v. Tillman, 245 So. 2d 198 (Miss. 1971).

Where a prime contractor, after the subcontractor failed to furnish a performance bond, terminated the subcontract and thereafter directed the subcontract work in all particulars, a workman who was killed when struck by a vehicle engaged in performance of the subcontract was an employee of the prime contractor, and the prime contractor was precluded from the recovery of indemnification from the subcontractor for the amount of a settlement in a wrongful death action. C.H. Leavell & Co. v. Doster, 233 So. 2d 775 (Miss. 1970).

The wrongful death statute creates an entirely new cause of action for the benefit of the persons named in the act, and the cause of action is not a part of the estate of the decedent. Harvey v. State, 218 So. 2d 11 (Miss. 1969).

State law, rather than Death on the High Seas Act, governs the remedies for wrongful deaths occurring on artificial islands and fixed structures erected thereon on the outer Continental Shelf. Rodrigue v. Aetna Cas. & Sur. Co., 395 U.S. 352, 89 S. Ct. 1835, 23 L. Ed. 2d 360 (1969), but see Herb's Welding v. Gray, 703 F.2d 176 (5th Cir. 1983).

An action for wrongful death is not derivative. Triplett v. United States, 213 F. Supp. 887 (S.D. Miss. 1963).

Since an action under the wrongful death statute against a motorist for the death of a four and a half year old child was not an action by the child's estate, but was one brought by the administrator on behalf of the surviving heirs named in the statute, the estate of the decedent could not be adversely, beneficially, or otherwise affected thereby, and the motorist was not disqualified as a witness by the dead man's statute. Hawkins v. Rye, 233 Miss. 132, 101 So. 2d 516, 77 A.L.R.2d 663 (1958).

Since this section [Code 1942, § 1453] created an action unknown to the common law, the court was not justified in extending its application beyond its terms. Logan v. Durham, 231 Miss. 232, 95 So. 2d 227 (1957).

Where an amendment to the statute provided that if employer fails to secure the payment of workmen's compensation, the employee or the legal representative has the choice between claiming compensation or suing at law for damages, and in such event neither negligence of fellow servant, assumption of risk, nor contributory negligence can be pleaded, this amendment did not repeal the Workmen's Compensation Law and reinstate the right to maintain an action for wrongful death of an employee as in existence prior to the original enactment of the statute. Allen v. R.G. Le Tourneau, Inc., 220 Miss. 520, 71 So. 2d 447 (1954).

This section [Code 1942, § 1453] is in derogation of the common law and as such must be strictly construed. Boroughs v. Oliver, 217 Miss. 280, 64 So. 2d 338 (1953); Hasson Grocery Co. v. Cook, 196 Miss. 452, 17 So. 2d 791 (1944).

The statute is not one of survival but creates a new and independent cause of action. Hasson Grocery Co. v. Cook, 196 Miss. 452, 17 So. 2d 791 (1944); Hawkins v. Rye, 233 Miss. 132, 101 So. 2d 516, 77 A.L.R.2d 663 (1958).

The statute does not cause the deceased's right of action to survive or be revived, but creates an independent cause of action. Thames v. Mississippi ex rel. Shoemaker, 117 F.2d 949, 136 A.L.R. 926 (5th Cir. 1941), cert. denied, 314 U.S. 630, 62 S. Ct. 63, 86 L. Ed. 506 (1941).

The history of this section [Code 1942, § 1453] is discussed in Illinois Cent. R. Co. v. Fuller (Miss. 1913) 106 Miss. 65, 63 So. 265

2. Right of action generally.

Miss. Code Ann. § 11-7-13 did not recognize "contingent" wrongful death claims as to do so would usurp the child's right to damages to which she would be entitled simply because her relatives anticipated her death earlier than it would naturally occur; therefore, there was no claim upon which relief could be granted, and the trial court was correct to grant a dismissal.

sal. *Butler v. Brantley* (In re *Brantley*), 865 So. 2d 1126 (Miss. 2004).

While Miss. Code Ann. § 11-7-13 (Supp. 2003) allows wrongful death beneficiaries to maintain an action to recover damages as would the decedent if death had not ensued, the action is derivative and the beneficiaries stand in the position of their decedent; thus, where the decedent was a prison inmate who could not have filed an action against the Mississippi Department of Corrections or a prison superintendent because of the immunity granted in Miss. Code Ann. § 11-46-9(1)(m), his wrongful death beneficiaries could not maintain a wrongful death action against those defendants. *Carter v. Miss. Dep't of Corr.*, 860 So. 2d 1187 (Miss. 2003).

Heirs of deceased smoker could not recover damages for injuries suffered by smoker during his lifetime in wrongful death action where jury found that cause of death was unrelated to smoker's lung cancer or chronic obstructive pulmonary disease, but rather was pulmonary embolism caused by complications resulting from treatment for gonorrhea in 1940's, and heirs did not also assert claim under survival statute. *Wilks v. American Tobacco Co.*, 680 So. 2d 839 (Miss. 1996).

Wrongful death action is not part of estate of deceased, and only those individuals listed in wrongful death statute may bring this independent, statutory cause of action. *Pannell v. Guess*, 671 So. 2d 1310 (Miss. 1996).

Family members of motorist who was left in coma as result of automobile accident did not have claim under Mississippi law for "loss of filial consortium" similar to wrongful death claim, even though loss they suffered was arguably similar; rather, claim remained one in nature of personal injury, despite severity of injury, as claim by motorist survived through conservator. *Moore v. Kroger Co.*, 800 F. Supp. 429 (N.D. Miss. 1992), *aff'd*, 18 F.3d 936 (5th Cir. 1994).

Mother of decedent was not entitled to bring wrongful death action where decedent was killed when he was struck by car while working on highway project; contention that wrongful death statute controlled over Workers' Compensation provision which provided that it would be

exclusive remedy; also rejected was argument that because mother was not dependent on decedent exclusive remedy provision in death benefit cases did not apply was also rejected, because act intended to provide exclusive remedy growing out of employer-employee relationship, and different result would subject employer in many instances to double liability. *Estate of Morris v. W.E. Blain & Sons*, 511 So. 2d 945 (Miss. 1987).

Wrongful death action may be maintained when unborn child dies after reaching pre-natal age of viability, when destruction of life of its mother does not necessarily mean end of its life also, and when, if separated from its mother, it would be so far matured as human being that it would live and grow mentally and physically as person; if such child dies before birth as result of negligent act of another, action may be maintained under wrongful death statute. *Terrell v. Rankin*, 511 So. 2d 126 (Miss. 1987).

Dismissal of personal injury claims brought by particular plaintiff does not collaterally estop wrongful death action asserted on behalf of family members by plaintiff in representative capacity since party appearing in representative capacity for others is not bound by determination of earlier suit in which he appeared only in individual capacity. *Freeman v. Lester Coggins Trucking, Inc.*, 771 F.2d 860 (5th Cir. 1985).

Where the husband of a deceased woman, he being the sole party in interest under § 11-7-13, sued and recovered judgment in a court of competent jurisdiction for all damages resulting from his wife's death against all of the parties jointly and severally liable, and the judgment was paid in full, the cause of action against all parties who were jointly and severally liable for the woman's death was thereby terminated; accordingly, a subsequent suit by the deceased's sister, individually and as representative of the heirs and as administratrix of the deceased's estate, was properly dismissed with prejudice. *Campbell v. C & H Transp. Co.*, 411 So. 2d 1284 (Miss. 1982).

In an action to recover for the wrongful death of a boy who was injured after climbing into a newly installed septic tank

that had been opened to facilitate an inspection, defendants were entitled to a peremptory instruction relieving them of liability, since the duty owed to the boy as a trespasser or at most as a licensee, was to refrain from willfully or wantonly injuring him; nor was the doctrine of attractive nuisance applicable under these facts since the septic tank was not an inherently dangerous instrumentality. *Hughes v. Star Homes, Inc.*, 379 So. 2d 301 (Miss. 1980).

This section did not authorize a wrongful death claim, based on a warranty theory of liability, against the manufacturer and original seller of the aircraft in which decedent was killed. *McCullough v. Beech Aircraft Corp.*, 587 F.2d 754 (5th Cir. 1979).

In a wrongful death action based in part upon the failure of an aircraft seat and harness upon a crash, such failure was regarded as a separate or "second accident" where the alleged defect did not cause or contribute to the initial mishap and did not arise from the intended normal use for which the product was manufactured. *Williams v. Cessna Aircraft Corp.*, 376 F. Supp. 603 (N.D. Miss. 1974).

An action is not maintainable for the wrongful death of one whose right against defendant is limited to the recovery of workmen's compensation. *Evans v. Avery*, 272 Ala. 230, 130 So. 2d 373 (Ala. 1961).

A municipality may be held liable under this statute [Code 1942, § 1453]. *City of Corinth v. Gilmore*, 236 Miss. 296, 110 So. 2d 606 (1959).

Where a nonresident and a resident were killed in an automobile collision in Mississippi allegedly as the result of the nonresident's negligence, the heirs of the deceased resident had a cause of action against the personal representative of the deceased nonresident under this section [Code 1942, § 1453], and were creditors of the nonresident's estate, and upon their petition the chancery court of the county where the nonresident's death occurred had jurisdiction to grant administration upon the estate of the nonresident. *Day v. Hart*, 232 Miss. 516, 99 So. 2d 656 (1958).

Where a wife died of injuries sustained in an automobile accident allegedly due to the negligence of her husband, an action

was not maintainable against the husband by or on behalf of the deceased's mother and father and sisters, the remoter class of beneficiaries under this section [Code 1942, § 1453], merely because the preferred beneficiaries, the husband, as tortfeasor, or the unemancipated minor child of the husband and wife, could not maintain the action. *Logan v. Durham*, 231 Miss. 232, 95 So. 2d 227 (1957).

Under this section [Code 1942, § 1453] it is essential to the maintenance of an action for death by wrongful act that the wrongful act be of such character as would have supported an action by the deceased for his injuries if he had survived. *Rainey v. Horn*, 221 Miss. 269, 72 So. 2d 434 (1954).

This section [Code 1942, § 1453] is an adaption of Lord Campbell's Act, which in derogation of the common law gave a cause of action to the executor or administrator of a person whose death had been caused by defendants' wrongful act, neglect, or default, and extends this right of action to the widow or other appropriate heirs of the deceased when the death has been "caused by any real wrongful or negligent act, or omission, or by [any] unsafe machinery, way or appliances" in cases where the injured party, had he survived, could have maintained an action in respect thereof. *Hasson Grocery Co. v. Cook*, 196 Miss. 452, 17 So. 2d 791 (1944).

While the right of a decedent to maintain an action, if he had survived, is a prerequisite to the right of his widow to maintain an action for his death, the initial requirement remains that death must have been caused by a real wrongful or negligent act. *Hasson Grocery Co. v. Cook*, 196 Miss. 452, 17 So. 2d 791 (1944).

While the early refinements in the construction of this section [Code 1942, § 1453] were concerned with the definitive scope of "negligence," involving the propriety of including deliberate or felonious acts, the employment of the term "wrongful" expanded its meaning to include felonious acts, but nowhere in the materials from which this statutory reform was constructed is there found any reference to acts that were wrongful except in the tortious sense. *Hasson Grocery Co. v. Cook*, 196 Miss. 452, 17 So. 2d 791 (1944).

The employment of the words "real wrongful" in this section [Code 1942, § 1453] narrows its meaning to an actual and not a nominal or constructive wrong. *Hasson Grocery Co. v. Cook*, 196 Miss. 452, 17 So. 2d 791 (1944).

This section [Code 1942, § 1453] does not create a right of action *ex contractu* by a widow for the death of her husband. *Hasson Grocery Co. v. Cook*, 196 Miss. 452, 17 So. 2d 791 (1944).

A widow does not, under this section [Code 1942, § 1453], have a right of action for the death of her husband, caused by eating pie infected with a poisonous substance, grounded upon breach of implied warranty, since the statute applies only to death caused by a wrongful or negligent act. *Hasson Grocery Co. v. Cook*, 196 Miss. 452, 17 So. 2d 791 (1944).

Code of 1892 § 663, as amended by Laws 1898 ch. 65 (Code 1906, § 721) and incorporated above, relates to causes of action antedating the constitution, of liability under the general law of negligence, and in no way to causes of action for injuries inflicted by fellow servants. Hence, it was not repealed or affected by Laws 1898, ch. 66 (since declared unconstitutional in *Ballard v. Mississippi Cotton Oil Co.* 81 M 507, 34 So 533). Const. § 193, and (Code 1892, § 4056) as amended by Acts 1898 ch. 66, relate exclusively to actions by employees to recover for injuries due to negligence of those fellow servants named therein. *Bussey v. Gulf & S.I.R. Co.*, 79 Miss. 597, 31 So. 212 (1902).

By the express terms of Laws 1898 ch. 65, incorporated above, it applies to all personal injuries of employees, resulting in death, due to the negligence of the master. *Bussey v. Gulf & S.I.R. Co.*, 79 Miss. 597, 31 So. 212 (1902).

The right of a parent under this section (Code 1906, § 721) depends on whether the child, had it survived, could have maintained an action for the injury. *White v. Louisville, N.O. & T. Ry.*, 72 Miss. 12, 16 So. 248 (1894).

The right of action is independent of that given to the executor and administrator. *Vicksburg & M.R.R. v. Phillips*, 64 Miss. 693, 2 So. 537 (1887).

3. —Marital misconduct, as affected by.

The wife's conduct will not prevent recovery for the death of her husband. *Belzoni Hardwood Lumber Co. v. Langford*, 127 Miss. 234, 89 So. 919, 18 A.L.R. 1406 (1921).

4. —Enforcement of foreign cause of action.

Under this section [Code 1942, § 1453] a minor whose mother was appointed a tutrix for purpose of bringing action under the Louisiana workmen's compensation law could sue in federal district court for Mississippi district by mother as next friend, to recover damages for father's death, and Louisiana court's leave was not required inasmuch as the law of Mississippi was governing. *C.J. Peck Oil Co. v. Diamond ex rel. Bond*, 204 F.2d 179 (5th Cir. 1953).

Where wrongful death caused in Louisiana, an administrator cannot maintain suit therefor in Mississippi because no right of action is given the administrator in Louisiana. *Vicksburg, S. & P. Ry. v. Williams*, 102 Miss. 735, 59 So. 883 (1912).

Where an injury occurs in Louisiana the rights of the parties will be determined by the Louisiana statutes. *Runt v. Illinois Cent. R.R.*, 88 Miss. 575, 41 So. 1 (1906).

Where the injury resulting in death occurs in another state having a statute substantially corresponding to ours the remedy may be enforced here. *Chicago, St. L. & N.O.R. Co. v. Doyle*, 60 Miss. 977 (1883).

5. Persons entitled to sue.

Wrongful death statute does not provide mechanism to allow courts to bypass statutory order of beneficiaries so that one statutory beneficiary, more removed from deceased under statute yet emotionally closer to deceased, can bring action over proper statutory beneficiary; it is possible that at times best relative to bring wrongful death action, because of his closeness to deceased, might not be relative allowed by statute to bring such action. *Penalver v. Howell*, 687 So. 2d 1171 (Miss. 1996), reh'g denied (Miss. Jan. 23, 1997).

Decedent's mother, sister, and brothers are not proper beneficiaries where dece-

dent was survived by minor children, despite fact that children had been adopted by their paternal aunt prior to decedent's death, since law permits adopted children to inherit both through their adoptive parents and natural parents. *Fillingame v. Patterson*, 704 F. Supp. 702 (S.D. Miss. 1988).

It is clearly established in Mississippi case law that parent is immune to tort suit by his unemancipated minor child, and therefore minor child cannot bring action against father who shot and killed his wife, child's mother; Parental Immunity Doctrine is not affected by case holding that spousal immunity had ceased to exist when it was destroyed by intentional killing of spouse. *Veselits ex rel. Cruthirds v. Veselits*, 824 F.2d 391 (5th Cir. 1987).

Unemancipated minor child under legal guardianship of grandmother cannot maintain, through grandmother, wrongful death action against her natural father where natural father was convicted of manslaughter for death of wife and natural mother of minor, as there is still mutual love and affection shared by father and daughter, father has not abandoned child, and there exists father's legal duty of support, together with mutual rights of heirship between father and daughter. *Veselits ex rel. Cruthirds v. Veselits*, 653 F. Supp. 1570 (S.D. Miss. 1987), *aff'd*, 824 F.2d 391 (5th Cir. 1987).

Illegitimate child has right to inherit in father's wrongful death claim, but such claim must be asserted and established by clear and convincing evidence under §§ 91-1-27 and 91-1-29. *Ivy v. Illinois Cent. Gulf R. Co.*, 510 So. 2d 520 (Miss. 1987).

Surviving adoptive brothers and sisters of child killed in automobile collision have right to bring suit under Mississippi wrongful death statute (§ 11-7-13), to exclusion of natural brothers and sisters of adoptive child. *McLemore ex rel. McLemore v. Gammon*, 468 So. 2d 84 (Miss. 1985).

The son of a pedestrian who was killed when struck by a vehicle is a proper person to prosecute a wrongful death action for and on behalf of himself, the other wrongful death beneficiaries of the decedent, and the decedent's personal repre-

sentative. *Hornburger v. Baird*, 508 F. Supp. 84 (N.D. Miss. 1980).

Decedent's mother had no standing to bring a wrongful death action under § 11-7-13, even though decedent's will named her as executrix of his estate and sole primary beneficiary, where decedent left surviving him his wife, who was injured in the same accident and died approximately 30 minutes after her husband; a cause of action accrued to the wife even though she survived decedent for only a few minutes, and this cause of action was an asset in her estate, upon which it was entitled to sue pursuant to § 91-7-233; furthermore, decedent's will could not circumvent the wrongful death statute, which created a new and independent cause of action in favor of those named in the statute, and recovery under the statute would become an asset of decedent's estate only if none of the statutory heirs had survived him. *Partyka v. Yazoo Dev. Corp.*, 376 So. 2d 646 (Miss. 1979).

The administratrix or the heirs, but not both, may bring suit for wrongful death pursuant to Code 1942, § 1453. *Jones v. Steiner*, 481 F.2d 392 (5th Cir. 1973).

If the deceased is survived by wife, husband, child, father, mother, sister or brother and suit is brought by one of such persons, there can only be one suit for the benefit of all entitled to share in the distribution, and the damages recoverable in such suit are punitive damages, pain and suffering of the deceased and damages that his heirs might have suffered because of their personal relationship with the deceased, such as support and loss of companionship. *Thornton v. Insurance Co. of N. Am.*, 287 So. 2d 262 (Miss. 1973).

If a deceased is not survived by husband, wife, child, mother, father, brother or sister, suit should be brought by the personal representative for all damages recoverable under the statute, and any sum recovered in such suit is subject to the debts and liabilities of the deceased, and any balance remaining is subject to general distribution. *Thornton v. Insurance Co. of N. Am.*, 287 So. 2d 262 (Miss. 1973).

If the deceased is survived by wife, husband, child, father, mother, sister or brother and suit is brought by the per-

sonal representative of the deceased, all damages may be recovered in such suit, although the declaration should be in two counts with reference to the damages sought, one count seeking damages recoverable by the survivors listed in the statute, with the other count seeking damages recoverable by the personal representative as assets of the estate such as damage to real or personal property, funeral expenses and medical expenses. *Thornton v. Insurance Co. of N. Am.*, 287 So. 2d 262 (Miss. 1973).

Since the legislature studiously avoided any mention of a first cousin as a dependent, beneficiary, or representative of the deceased who could bring an action for wrongful death, where the deceased was a widow and left no children, no father, no mother, no brother and no sister, only the executrix could bring an action as the personal representative of the deceased. *Smith v. Garrett*, 287 So. 2d 258 (Miss. 1973).

Mississippi's wrongful death statute which does not permit an illegitimate child to sue for or recover damages for the wrongful death of the father, where the father has not acknowledged the child, does not deny an illegitimate child who had not been acknowledged by the deceased equal protection of the laws, in view of the facts that it is a simple matter to prove the maternity of an illegitimate child, but it is infinitely more complex and difficult to prove paternity, and in Mississippi the requirements are simple and easy for a father to legitimize his child under the law. *Sanders v. Tillman*, 245 So. 2d 198 (Miss. 1971).

An adopting parent has a right to bring an action for the wrongful death of his adopted infant child. *Bush Constr. Co. v. Walters*, 250 Miss. 384, 164 So. 2d 900 (1964).

In the wrongful death statute there is no expression indicating a legislative intent to abrogate the rule that a minor may not sue a parent in tort. *Durham v. Durham*, 227 Miss. 76, 85 So. 2d 807 (1956).

Where wife died in an automobile accident as a result of the negligent operation of vehicle by her husband, she could not have sued the husband in tort even if she had survived. *Durham v. Durham*, 227 Miss. 76, 85 So. 2d 807 (1956).

Administratrix has the right to bring a suit against the city for wrongful death of a child. *City of Hattiesburg v. Hillman*, 222 Miss. 443, 76 So. 2d 368 (1954).

Prior to the 1958 amendment it had been held that under the wrongful death statute, the word parent meant the natural father or mother of the child, and the adoptive parents had no right to sue for the wrongful death of an adopted child. *Boroughs v. Oliver*, 217 Miss. 280, 64 So. 2d 338 (1953).

There is no distinction in the right to sue as between the personal representative and the survivors and the one who first brings the suit has the right to prosecute and maintain it to a conclusion. *Southern Pine Elec. Power Ass'n v. Denson*, 214 Miss. 397, 57 So. 2d 859 (1952), error overruled 214 Miss. 397, 59 So. 2d 75.

Under the statutes the right of action is in the survivors, to be asserted by the personal representative for the benefit of all persons entitled to recover, or by such survivors, and the cause of action is not abated by the death of such survivors. *Southern Pine Elec. Power Ass'n v. Denson*, 214 Miss. 397, 57 So. 2d 859 (1952), error overruled 214 Miss. 397, 59 So. 2d 75.

Where the daughter sued her stepfather for wrongfully causing death of her mother, the fact that the mother had she lived could not sue the step-father for assault, does not affect the daughter's right to maintain an action. *Deposit Guar. Bank & Trust Co. v. Nelson*, 212 Miss. 335, 54 So. 2d 476 (1951).

Decree in proceeding for appointment of administratrix and contract with attorney on part of administratrix for prosecution of death action can have no effect on right of widow and children to institute and maintain suit. *Mississippi Power & Light Co. v. Smith*, 169 Miss. 447, 153 So. 376 (1934).

As between widow and children on one hand and administratrix or personal representative on the other, one who first brings death action has right to prosecute and maintain it to conclusion. *Mississippi Power & Light Co. v. Smith*, 169 Miss. 447, 153 So. 376 (1934).

This cause of action for wrongful death does not pass to trustee in bankruptcy.

Dent v. Town of Mendenhall, 139 Miss. 271, 104 So. 82 (1925).

While a suit is pending by a personal representative, the widow has no right to sue. *J.J. Newman Lumber Co. v. Scipp*, 128 Miss. 322, 91 So. 11 (1922).

An employee of a railroad company engaged in interstate commerce cannot recover under this section [Code 1942, § 1453]. His rights are controlled by the federal statute. *New Orleans, M. & C.R. Co. v. Jones*, 111 Miss. 852, 72 So. 681 (1916).

A suit for personal injuries may be revived after the death of the injured party in the name of his administratrix who may in that suit recover such damages as he could have recovered if living and she may thereafter sue for her husband's negligent death, but the second suit must not embrace damages previously sued for. *Hamel v. Southern R. Co.*, 108 Miss. 172, 66 So. 426 (1914), error overruled, 108 Miss. 195, 66 So. 809 (1915).

A suit by the widow and children for the death of the father precludes the administratrix from recovering damages for the same injury. *Mobile, J. & K.C.R. Co. v. Hicks*, 91 Miss. 273, 46 So. 360, 124 Am. St. R. 679 (1908), *aff'd*, 219 U.S. 35, 31 S. Ct. 136, 55 L. Ed. 78, Am. Ann. Cas. 1912A, 463 (1910).

It is competent for the legislature, as was done in Laws 1898, ch. 66, to extend the remedy provided by Const. § 193, so as to authorize actions by others than the legal or personal representatives of the person injured. *Bussey v. Gulf & S.I.R. Co.*, 79 Miss. 597, 31 So. 212 (1902).

An illegitimate daughter cannot sue for the death of another illegitimate daughter. *Illinois Cent. R.R. v. Johnson*, 77 Miss. 727, 28 So. 753 (1900).

An action can be maintained under Code 1906, § 721 by the mother, a sole surviving parent, for the death of her son, an employee, because of negligence of the railroad company in failing to provide safe machinery and appliances, such negligence being that of the company itself, and not the negligence of a co-employee. The ground of liability existed before the Constitution of 1890 and is wholly independent of it. *White v. Louisville, N.O. & T. Ry.*, 72 Miss. 12, 16 So. 248 (1894).

It is only where an employee is killed through the negligence of a fellow servant that the action must be brought by the personal representative under Const. § 193. *White v. Louisville, N.O. & T. Ry.*, 72 Miss. 12, 16 So. 248 (1894).

Independently of the statute, the mother, being the only surviving parent, may maintain a suit for injuries resulting in the death of an infant son, for the time between the injury and death. *Natchez, J. & C.R. Co. v. Cook*, 63 Miss. 38 (1885).

6. Persons entitled to recover.

Where a decedent was allegedly injured by medication during her life, and allegedly died from it, the estate administrator was to assert both a wrongful death action and a survival action against the drug manufacturer; if the jury found that the drug caused the decedent's death, then the recovery belonged to the wrongful death heirs. If the jury found that the drug did not cause the death, the estate could recover for any personal injuries caused by the drug, and the decedent's ex-husband could recover from the estate amount he was entitled to under the decedent's holographic instrument. *England v. England (In re Estate of England)*, 846 So. 2d 1060 (Miss. Ct. App. 2003).

Because a wrongful death claim accrued at death, a decedent could not have assigned it — or the personal injury component of the wrongful death claim that survived her death pursuant to Miss. Code Ann. § 11-7-13 — to her ex-husband under Miss. Code Ann. § 11-7-3. *England v. England*, 846 So. 2d 1060 (Miss. Ct. App. 2003).

Neither the father of an illegitimate child nor an illegitimate half-brother could recover for the wrongful death of the child where the father never met the child, failed to support the child, and failed to acknowledge the child as his own during the child's lifetime, notwithstanding that he did not receive the results of a blood test that established his paternity until just four days before the child's death. *Stanton v. Patterson*, 798 So. 2d 347 (Miss. 2001).

Under wrongful death statute, adopted child was wrongful death beneficiary of his natural father; right to bring wrongful death action for natural father's death

was not terminated at time of adoption. *Penalver v. Howell*, 687 So. 2d 1171 (Miss. 1996), reh'g denied (Miss. Jan. 23, 1997).

Inheritance laws of Mississippi, where decedent's estate was located, rather than law of Louisiana, pursuant to which decedent's natural child was adopted, applied in determining whether child was wrongful death beneficiary. *Penalver v. Howell*, 687 So. 2d 1171 (Miss. 1996), reh'g denied (Miss. Jan. 23, 1997).

Although adopted child might have had difficult time establishing certain damages in wrongful death suit arising from death of his natural father, particularly in establishing loss of love, society, companionship, loss of household services, loss of gifts, gratuities, remembrances, and support, he could nevertheless bring wrongful death action seeking present net cash value for father's life expectancy, loss of companionship and society of father, damages for father's pain and suffering between time of injury and death, and punitive damages. *Penalver v. Howell*, 687 So. 2d 1171 (Miss. 1996), reh'g denied (Miss. Jan. 23, 1997).

Where wrongful death action and action against uninsured motorist coverage for same death are simultaneously pending, uninsured motorist coverage is source of funds from which wrongful death heir who controls prosecution of wrongful death action may satisfy any judgment recovered on behalf of all wrongful death heirs; therefore first wrongful death plaintiff will not be preempted from choosing trial tactics or electing remedies by another wrongful death heir; consolidation of two such suits for purpose of ordering settlement is appropriate. *Rampy ex rel. Rampy v. Austin*, 718 F. Supp. 556 (S.D. Miss. 1989).

Biological father entitled to inherit from illegitimate child is entitled to share in recovery in wrongful death action. *Burdette v. Crump*, 472 So. 2d 959 (Miss. 1985).

The daughter of a deceased insured was also an insured entitled to recover uninsured motorist benefits where both of the policies at issue defined the term "insured" to include any person entitled to recover damages and where the daughter, under the provisions of this section, would

be entitled to maintain a wrongful death action for the death of her mother. *Pearthree v. Hartford Accident & Indem. Co.*, 373 So. 2d 267 (Miss. 1979).

The legislature intended that, if there were no surviving heirs as specifically named and listed in the wrongful death statute, the damages recovered in a wrongful death action would become an asset of the estate to be used as any other asset in the payment of the "just debts of the estate" and then any residue to be distributed according to the last will and testament of the deceased, if there were a will, or under the statute of descent and distribution if there were no will, and where the nearest surviving relatives of the decedent were eleven first cousins, the net proceeds recovered in a wrongful death action were to be distributed to the sole residuary legatee under the last will and testament of the decedent. *Smith v. Garrett*, 287 So. 2d 258 (Miss. 1973).

Under Mississippi's wrongful death statute, an illegitimate child cannot sue for or recover damages for the wrongful death of his father, where the father has not acknowledged the child in any way recognized by Mississippi law. *Sanders v. Tillman*, 245 So. 2d 198 (Miss. 1971).

Two minor children who, after the death of their mother, had been adopted by their paternal grandparents at the behest of the father who continued to contribute to their support, were persons entitled to bring an action for the wrongful death of the father. *Alack v. Phelps*, 230 So. 2d 789 (Miss. 1970).

An heir cannot recover under this section [Code 1942, § 1453] unless the deceased himself could have recovered had he not been killed. *Market Ins. Co. v. United States*, 415 F.2d 459 (5th Cir. 1969).

Where the plaintiffs' evidence made a jury issue of whether as a result of the defendants' intentional torts in the illegal, improper, and perverted use of process for an ulterior motive or purpose, the decedent acted under an irresistible impulse and committed suicide, he would, had he lived, have a good cause of action against the defendants, and under the wrongful death statute his widow and children are entitled to recover damages which dece-

dent could have recovered. *State ex rel. Richardson v. Edgeworth*, 214 So. 2d 579 (Miss. 1968).

Husband's claim for medical expenses and loss of services of wife sustaining personal injuries survives, but that claim for loss of companionship and consortium does not. *Scott v. Munn*, 245 Miss. 120, 146 So. 2d 564 (1962).

An employer or insurer paying workmen's compensation for the death of an employee is entitled to share in the proceeds of a settlement of a claim against a third party tortfeasor for causing the employee's death only where the beneficiary of the death action is also a workmen's compensation beneficiary. *United States Fid. & Guar. Co. v. Higdon*, 235 Miss. 385, 109 So. 2d 329 (1959).

Under this statute [Code 1942, § 1453], whichever statutory beneficiary brings an action for wrongful death, the proceeds belong to those entitled as if they had all been named as plaintiffs. *Thames v. Mississippi ex rel. Shoemaker*, 117 F.2d 949, 136 A.L.R. 926 (5th Cir. 1941), cert. denied, 314 U.S. 630, 62 S. Ct. 63, 86 L. Ed. 506 (1941).

That one statutory beneficiary is person charged as defendant in death action, held not to prevent proportional recovery by other beneficiaries. *Nosser v. Nosser*, 161 Miss. 636, 137 So. 491 (1931).

7. Proximate cause.

Although wrongful death statute provides for recovery of all damages of every kind, which would certainly include lifetime damages, entire claim under statute must fail where heirs fail to prove by preponderance of evidence that death was caused by defendant. *Wilks v. American Tobacco Co.*, 680 So. 2d 839 (Miss. 1996).

Circuit Court did not err in granting motion of electric company for directed verdict where: expert testimony did not show that any act or omission of electric company proximately caused or contributed to death of decedent; electric company owed no duty to decedent with respect to electric lines not under its control; electric company neither owned nor controlled wiring beneath which decedent was found; fact that electric meter was moved had nothing to do with accident, where there was no circuit breaker after

rewiring, which had been done by someone other than electric company, between transformer and wiring going to place where decedent was killed; and, testimony showed that had breaker been in place and had wiring carrying current from transformer to place where decedent was killed gone through breaker, decedent would still have been shocked when he encountered wires and nothing in that encounter would have tripped breaker in time to save his life. *Upton v. Magnolia Elec. Power Ass'n*, 511 So. 2d 939 (Miss. 1987).

The trauma to decedent's left breast, received in a collision, which caused the metastasis of a dormant cancerous condition was held to have been the proximate cause of her death three years after the date of the accident. *New Orleans & N.R.R. v. Thornton*, 191 So. 2d 547 (Miss. 1966).

Where jury is warranted in finding that killing of child could have been avoided by defendant through exercise of reasonable care in keeping constant lookout for pedestrians who may chance to use highway, failure of mother to safeguard safety of child in crossing highway does not constitute direct or proximate cause of its death. *Gordon v. Lee*, 208 Miss. 21, 43 So. 2d 665 (1949).

Employer held liable for death of minor fatally burned as result of explosion while cleaning coin-operated machines with gasoline in small room in which there was a gas heater with open flame, notwithstanding immediate activating cause of explosion was running of rat from machine to heater and its return to machine after its fur was ignited. *United Novelty Co. v. Daniels*, 42 So. 2d 395 (Miss. 1949).

Where mechanic's helper died as result of a can of gasoline used in priming an engine being thrown on him by the mechanic after the gasoline therein had become ignited when the engine backfired, the employer would be liable if the proximate cause of the accident was the negligence of the employer in failing to furnish a safe priming can, but would not be liable if the proximate cause was the negligence of the mechanic. *Proctor & Gamble Defense Corp. v. Bean*, 146 F.2d 598 (5th Cir. 1945).

To establish liability under wrongful death statute, negligence complained of must be proximate or at least directly contributing cause of death, and must be proved as a reasonable probability. *Berryhill v. Nichols*, 171 Miss. 769, 158 So. 470 (1935).

If trespasser's death on railroad tracks resulted from engineer's failure to give warning signals after becoming aware of trespasser's danger, trespasser's administrator was entitled at least to nominal damages. *Young v. Columbus & G. Ry.*, 165 Miss. 287, 147 So. 342 (1933).

A widow cannot sue for injuries resulting in the death of her husband, an engineer, while running his locomotive, unless the proximate cause of his death was such negligence of the company as showed a want of ordinary care. *Illinois Cent. R.R. v. Woolley*, 77 Miss. 927, 28 So. 26 (1900).

8. Negligence and contributory negligence.

In a wrongful death action arising from a 4-car automobile accident, a driver's negligence in driving at too high a speed on a wet road, with worn tires, and paying insufficient attention to traffic ahead, were foreseeable acts of negligence and are precisely the types of negligence careful drivers of other vehicles must guard against. Thus, the driver's negligence was not an intervening cause sufficient to cut off the liability of another driver. *M & M Pipe & Pressure Vessel Fabricators, Inc. v. Roberts*, 531 So. 2d 615 (Miss. 1988).

Circuit Court did not err in granting motion of electric company for directed verdict where: expert testimony did not show that any act or omission of electric company proximately caused or contributed to death of decedent; electric company owed no duty to decedent with respect to electric lines not under its control; electric company neither owned nor controlled wiring beneath which decedent was found; fact that electric meter was moved had nothing to do with accident, where there was no circuit breaker after rewiring, which had been done by someone other than electric company, between transformer and wiring going to place where decedent was killed; and, testimony showed that had breaker been in place and had wiring carrying current from

transformer to place where decedent was killed gone through breaker, decedent would still have been shocked when he encountered wires and nothing in that encounter would have tripped breaker in time to save his life. *Upton v. Magnolia Elec. Power Ass'n*, 511 So. 2d 939 (Miss. 1987).

The United States, by and through the Corp of Engineers, is liable for the wrongful drowning deaths of swimmers where it was guilty of negligence in its supervision of a dredging operation which created a hazardous condition in the form of a depression surrounded by shallow water. *Price v. United States*, 530 F. Supp. 1010 (S.D. Miss. 1981), aff'd as modified, 726 F.2d 1057 (5th Cir. 1984).

In a wrongful death action brought by a minor decedent's parents, defendant was not entitled to contribution from the child's father, even though he was a joint tortfeasor, where the child could not have sued his father for damages had death not ensued; further, a diminution of damages was available only when the injured party, not a statutory beneficiary, had been contributorily negligent. *Hood v. Dealers Transp. Co.*, 472 F. Supp. 250 (N.D. Miss. 1979).

In a medical malpractice action, a general practitioner who failed to enlist the aid of a chest surgeon after a patient had suffered massive hemorrhaging and was coughing up blood failed to conform to the standard of care required of a general practitioner in his locality. *Pittman v. Gilmore*, 556 F.2d 1259 (5th Cir. 1977).

Defendants failed to discharge their duty to use reasonable and ordinary care to provide protection for minor children playing at or near a motel swimming pool where there was no lifeguard on duty, there were no gates on the fence surrounding the pool, no cover had been placed over the pool, and there was no life saving equipment or warning signs near the pool. *Gault v. Tablada*, 400 F. Supp. 136 (S.D. Miss. 1975), aff'd, 526 F.2d 1405 (5th Cir. 1976).

Owners of apartment complex, who were charged with foreseeing the danger presented by a water-filled swimming pool located in the middle of an apartment complex which was occupied by minor

children, were negligent where they failed to have a lifeguard on duty, to fence the area in question, to cover the pool, to maintain any resuscitation or rescue equipment, and to drain the pool when it was not expected to be used. *Kopera v. Moschella*, 400 F. Supp. 131 (S.D. Miss. 1975), *aff'd*, 526 F.2d 1405 (5th Cir. 1976).

In an action against an automobile driver for the alleged wrongful death of a minor who was riding a bicycle when it collided with the automobile, a jury verdict in favor of the driver foreclosed all questions of fact, resolved all conflicts in the evidence favorable to the driver, and also amounted to a factual finding by the jury that the driver of the automobile had not been negligent and had acted as a reasonably prudent person would have done under the same or similar circumstances. *McCollum v. Randolph*, 220 So. 2d 310 (Miss. 1969).

Motorist failing to slow down on being blinded by lights of approaching car held liable for death of pedestrian struck while walking on side of road. *Layton v. Cook*, 248 Miss. 690, 160 So. 2d 685 (1964).

It is no defense to an action for death to child in highway caused by motorist that driver was not responsible because he was only 5 feet 7 inches tall and that his vision of place where child was when hit by car did not begin closer than 63 feet ahead of him, on account of view being obstructed by hood of automobile and open airvent thereon. *Gordon v. Lee*, 208 Miss. 21, 43 So. 2d 665 (1949).

In action under this section [Code 1942, § 1453] for damages for death of child, five-year-old child is *prima facie* incapable of contributory negligence. *Gordon v. Lee*, 208 Miss. 21, 43 So. 2d 665 (1949).

In action against restaurateur for death to customer by serving food not fit for human consumption, it must be shown that restaurateur did not use that degree of care in the selection, preparation, cooking or serving of the food so injuring the customer as a reasonably prudent man, skilled in the art of selecting and preparing food for human consumption, would be expected to exercise in the selection and preparation of food for his own private table, the restaurateur not being an insurer against injury to his customers.

Goodwin v. Misticos, 207 Miss. 361, 42 So. 2d 397 (1949).

Employer not relieved of liability for death of minor fatally burned by explosion while cleaning coin-operated machine with gasoline in violation of instructions where there was no showing that employee himself was warned. *United Novelty Co. v. Daniels*, 42 So. 2d 395 (Miss. 1949).

In suit to recover for death of licensee or trespasser, owner of land is not liable irrespective of his negligence provided it did not amount to willful or wanton negligence. *Westmoreland v. Mississippi Power & Light Co.*, 172 F.2d 643 (5th Cir. 1949).

Bus company was not liable for death of passengers who alighted pursuant to their request at safe place on highway opposite their homes when they were struck by a passing automobile while attempting to cross the highway after the bus had gone, even though the bus driver gave no warning of the approaching automobile. *Beeson v. Tri-State Transit Co.*, 146 F.2d 754 (5th Cir. 1945).

Plaintiff has burden of showing in action against employer for employee's death that such was caused by the employer's negligence. *Proctor & Gamble Defense Corp. v. Bean*, 146 F.2d 598 (5th Cir. 1945).

Employer is not liable for death of mechanic's helper caused by the negligence of the mechanic. *Proctor & Gamble Defense Corp. v. Bean*, 146 F.2d 598 (5th Cir. 1945).

In respect to liability of master for death of employee, while master owes duty to promulgate rules where the work is dangerous and the conditions are obscure or complex, no such duty exists in regard to the use of simple tools and appliances or where the conditions are neither obscure nor complex. *Proctor & Gamble Defense Corp. v. Bean*, 146 F.2d 598 (5th Cir. 1945).

Even though a mechanic's helper, who dies as result of a can of gasoline used in priming an engine being thrown on him after the gasoline therein had become ignited when the engine backfired, was contributorily negligent in choosing the particular can and in standing in a dan-

gerous position, the jury could properly reduce the damages by virtue of the law of comparative negligence if the jury should find that the employer was liable in negligently failing to furnish a safe priming can. *Proctor & Gamble Defense Corp. v. Bean*, 146 F.2d 598 (5th Cir. 1945).

An infant cannot be held liable in death action for faults or omission when the duty to act otherwise must find its basis in an agreement by the infant. *Long v. Patterson*, 198 Miss. 554, 22 So. 2d 490 (1945).

Fourteen-year-old boy riding on farm tractor on highway, who agreed to warn the tractor operator of approaching traffic but who failed to warn him of a truck which collided with the tractor from the rear, could not be held liable for the death of the tractor operator. *Long v. Patterson*, 198 Miss. 554, 22 So. 2d 490 (1945).

Contributory negligence of one of the beneficiaries cannot be used as a defense in an action for damages causing death. *Hines v. McCullers*, 121 Miss. 666, 83 So. 734 (1920).

In an action by a widow for the death of her husband, the rule that to board a moving train is negligence, as a matter of law, is discussed and the facts held to constitute an exception. *Wooten v. Mobile & O.R.R.*, 79 Miss. 26, 29 So. 61 (1901).

In an action by a father for the death of his son it was held contributory negligence, as a matter of law, for the latter, an active and intelligent boy between twelve and thirteen years of age, who had knowledge of the danger, to voluntarily jump from a train going twenty miles an hour. *Howell v. Illinois Cent. R. Co.*, 75 Miss. 242, 21 So. 746 (1897).

Although nurse in charge of two small children attempted to cross railroad track while aware of approach of train, she was not necessarily guilty of contributory negligence, and where there was evidence to the effect that she would have had ample time to cross if she had not been confused by the outcries and commotion of a near-by crowd, finding of jury against contributory negligence in action for death of child would not be disturbed. *Alabama & V. Ry. Co. v. Lowe*, 73 Miss. 203, 19 So. 96 (1895).

9. Limitation of actions.

Trial court erred in ruling that the minor's savings statute, Miss. Code Ann. § 15-1-59, did not toll the statute of limitations on a wrongful death action; however, once a wrongful death suit was filed in her behalf, the minor no longer enjoyed the protection of § 15-1-59; since there could be but one cause of action under Miss. Code Ann. § 11-7-13, the minor was governed by the same statute of limitations as the decedent's administratrix. *Lee v. Thompson*, 859 So. 2d 981 (Miss. 2003).

Provisions of the minor's savings statute, Miss. Code Ann. § 15-1-59, and the wrongful death statute, Miss. Code Ann. § 11-7-13, conflict where there exists a person qualified under § 11-7-13 to bring suit, as § 11-7-13 requires that one suit be brought for damages from wrongful death. Thus, the statute of limitations runs against both the personal representative of the deceased and the deceased's children. *Curry v. Turner*, 832 So. 2d 508 (Miss. 2002).

A wrongful death action arising in the context of medical negligence is not measured from the date the decedent knew or should have known about the act of negligence, but rather, the cause of action does not accrue until the death of the negligently injured person. *Gentry v. Wallace*, 606 So. 2d 1117 (Miss. 1992).

Prescriptive periods applicable to claims brought by statutory heirs arising from alleged wrongful death of decedent were not tolled during pendency of prior wrongful death actions, inasmuch as wrongful death statute did not operate to bar any other action unless matter was decided on its merits, and in further view of fact that plaintiffs were active in state court litigation involving same subject matter before the court; plaintiffs' active involvement in state court action and their filing of prior lawsuit in federal court absolutely destroyed their argument that they were prohibited by law from bringing suit, furthermore, their participation in such earlier lawsuits negated any suspension of limitation period applicable under state law. *Brown v. Dow Chem. Co.*, 777 F. Supp. 504 (S.D. Miss. 1989).

Cause of action based upon wrongful death statute (§ 11-7-13), being predi-

cated upon defendant's intentional torts, is governed by one year statute of limitations, rather than 6 year statute of limitations, as actions filed pursuant to wrongful death statute must be brought within corresponding prescription statute for which cause of action is predicated. *Veselits ex rel. Cruthirds v. Veselits*, 653 F. Supp. 1570 (S.D. Miss. 1987), *aff'd*, 824 F.2d 391 (5th Cir. 1987).

In an action for wrongful death filed by the surviving spouse and children after the statutory limitation period had passed, § 15-1-59, the savings statute, did not toll the limitations period in favor of the children, since the surviving spouse was a person in esse who had the right to file suit for wrongful death during the six-year limitation period after decedent's death, and thus the action was barred. *Arender v. Smith County Hosp.*, 431 So. 2d 491 (Miss. 1983).

Where the death of a child which followed almost immediately its birth on December 16, 1964 was caused by the erroneous typing of its mother's blood on April 4, 1958, and the cause of action for the child's death against the infirmary which typed the mother's blood was cast under the provisions of this section [Code 1942, § 1453], the cause of action arose as of the date of the child's death and not as of the date the mother's blood was typed, and the trial court erroneously sustained a plea of the six-year statute of limitations. *Smith v. McComb Infirmary Ass'n*, 196 So. 2d 91 (Miss. 1967).

The limitation period does not condition the right of action under the statute. *Triplett v. United States*, 213 F. Supp. 887 (S.D. Miss. 1963).

Actions under the statute are, since the amendment of 1908, governed by the general statute of limitations. *Triplett v. United States*, 213 F. Supp. 887 (S.D. Miss. 1963).

The saving in favor of persons under disability contained in Code of 1892 § 2746, does not apply to actions under this section (Code 1892 § 663), which must be brought within one year after the death, without any saving for those under disability. *Foster v. Yazoo & Miss. V.R. Co.*, 72 Miss. 886, 18 So. 380 (1895).

10. Actions in general.

Since personal representative of decedent was expressly authorized by statute to commence wrongful death action for benefit of all heirs entitled to recover, personal representative had sufficient standing to determine heirship of testator's reputed illegitimate children for purposes of wrongful death statute. *Jones v. Estate of Richardson*, 695 So. 2d 587 (Miss. 1997).

Provision of wrongful death statute under which heirs may recover "whether an estate has been opened or not" allows heirs to bring wrongful death suit without regard to administration of estate, but is irrelevant to issue of elements which must be proven in order to recover for wrongful death. *Wilks v. American Tobacco Co.*, 680 So. 2d 839 (Miss. 1996).

For purposes of venue, cause of action in wrongful death case may occur and/or accrue in both county where death occurred and county where alleged negligence took place, making either county, if they are different, permissible venue. *Burgess v. Lucky*, 674 So. 2d 506 (Miss. 1996).

Wrongful death action arising out of medical care and/or treatment rendered to decedent by physicians was properly venued either in county where alleged negligence occurred or in county where decedent died. *Burgess v. Lucky*, 674 So. 2d 506 (Miss. 1996).

In a medical malpractice action arising from the death of a child, the county where the wrongful death beneficiaries resided was the proper venue for the action, even though the cause of action accrued in another county in which all of the defendants resided at the time the cause of action accrued, where one of the defendants had become a resident of the state of Louisiana at the time the complaint was filed. *Senatobia Community Hosp. v. Orr*, 607 So. 2d 1224 (Miss. 1992).

Prescriptive periods applicable to claims brought by statutory heirs arising from alleged wrongful death of decedent were not tolled during pendency of prior wrongful death actions, inasmuch as wrongful death statute did not operate to bar any other action unless matter was decided on its merits, and in further view

of fact that plaintiffs were active in state court litigation involving same subject matter before the court; plaintiffs' active involvement in state court action and their filing of prior lawsuit in federal court absolutely destroyed their argument that they were prohibited by law from bringing suit, furthermore, their participation in such earlier lawsuits negated any suspension of limitation period applicable under state law. *Brown v. Dow Chem. Co.*, 777 F. Supp. 504 (S.D. Miss. 1989).

The Mississippi long-arm statute (Code 1972, § 13-3-57) could be utilized in an action for the wrongful death, pursuant to Code 1972, § 11-7-13, of a nonresident decedent, where the plaintiff was a Mississippi resident suing as administrator of the decedent's estate pursuant to letters of administration granted by a Mississippi chancery court. *McAlpin v. James McKoane Enters., Inc.*, 395 F. Supp. 937 (N.D. Miss. 1975).

An instance where a suit by decedent dying after suit and revived by his executrix barred the recovery on suit by the executrix thereafter filed. *Edward Hines Yellow Pine Trustees v. Stewart*, 135 Miss. 331, 100 So. 12 (1924).

A second suit cannot be brought under the same cause in behalf of a child unborn at the time first suit was instituted. *Gulf & S.I.R.R. v. Bradley*, 110 Miss. 152, 69 So. 666 (1915).

Where death results from an injury sued for, only one suit can be instituted. *Foster v. Hicks*, 93 Miss. 219, 46 So. 533 (1908).

11. —Joinder of actions.

Where wrongful death action and action against uninsured motorist coverage for same death are simultaneously pending, uninsured motorist coverage is source of funds from which wrongful death heir who controls prosecution of wrongful death action may satisfy any judgment recovered on behalf of all wrongful death heirs; therefore first wrongful death plaintiff will not be preempted from choosing trial tactics or electing remedies by another wrongful death heir; consolidation of two such suits for purpose of ordering settlement is appropriate. *Rampy ex rel. Rampy v. Austin*, 718 F. Supp. 556 (S.D. Miss. 1989).

Where death occurs to two persons at the same time under the identical facts, and beneficiaries are the same as to both persons, the action may be joined for damages for the death of both. *Payne v. Moore*, 126 Miss. 693, 89 So. 225 (1921).

A suit for the death of the wife and daughter may be joined in one action where the death happened at the same time and due to the same facts of alleged negligence. *Hines v. McCullers*, 121 Miss. 666, 83 So. 734 (1920).

12. —Removal of cause.

A wrongful death action brought by a resident of Maine as administrator against a Maine corporation was removable to the Federal court on the ground of diversity of citizenship in view of this section [Code 1942, § 1453] under which a decedent's widow and children are alone entitled to the damages for his death, and such resident widow and children were the "real parties in interest." *Mississippi Power Co. v. Archibald*, 189 Miss. 332, 196 So. 760 (1940).

13. Pleading.

If the deceased is survived by wife, husband, child, father, mother, sister or brother and suit is brought by the personal representative of the deceased, all damages may be recovered in such suit, although the declaration should be in two counts with reference to the damages sought, one count seeking damages recoverable by the survivors listed in the statute, with the other count seeking damages recoverable by the personal representative as assets of the estate such as damages to real or personal property, funeral expenses and medical expenses. *Thornton v. Insurance Co. of N. Am.*, 287 So. 2d 262 (Miss. 1973).

In an action against electric power association for death of the deceased as result of electrocution wherein the electric power association did not plead as an affirmative defense that the wife of the deceased who came to her death by electrocution on the same occasion survived her husband, the court properly refused an instruction that in event the jury should believe from preponderance of evidence that the wife survived her husband, the amount of the verdict, if any, should be

for nominal damages only, or in such amount as would compensate for the loss of the companionship of her husband during the brief period of time that she survived him. *Southern Pine Elec. Power Ass'n v. Denson*, 214 Miss. 397, 57 So. 2d 859 (1952), error overruled 214 Miss. 397, 59 So. 2d 75.

In an action under this section [Code 1942, § 1453] it is not necessary to allege or prove that decedent left any relatives or creditors surviving. *Yazoo & Miss. V. Ry. v. Barringer*, 138 Miss. 296, 103 So. 86 (1925).

It must be alleged and shown how the injury complained of occurred and that negligence of the defendant caused it. *Mississippi Cotton Oil Co. v. Smith*, 95 Miss. 528, 48 So. 735 (1909).

14. Issues, proof and variance.

Wrongful death action is to compensate beneficiary for loss of companionship and society of decedent, pain and suffering of decedent between time of injury and death, and punitive damages and, thus, beneficiary need only establish some of those elements in order to recover for decedent's wrongful death. *Penalver v. Howell*, 687 So. 2d 1171 (Miss. 1996), reh'g denied (Miss. Jan. 23, 1997).

Although adopted child might have had difficult time establishing certain damages in wrongful death suit arising from death of his natural father, particularly in establishing loss of love, society, companionship, loss of household services, loss of gifts, gratuities, remembrances, and support, he could nevertheless bring wrongful death action seeking present net cash value for father's life expectancy, loss of companionship and society of father, damages for father's pain and suffering between time of injury and death, and punitive damages. *Penalver v. Howell*, 687 So. 2d 1171 (Miss. 1996), reh'g denied (Miss. Jan. 23, 1997).

Variance between declaration alleging railroad's failure to give statutory crossing signals and proof of failure to give common-law warning to trespasser on tracks after notice of danger held not to require reversal. *Young v. Columbus & G. Ry.*, 165 Miss. 287, 147 So. 342 (1933).

A mother cannot recover damages for her son's prospective earnings in the ab-

sence of proof. *Mississippi Cotton Oil Co. v. Smith*, 95 Miss. 528, 48 So. 735 (1909).

15. Parties.

When the personal representative of a decedent person brings an action under Code 1942, § 1453 he is the real party in interest though not necessarily the person who will ultimately benefit from the recovery; and the fact that citizenship of some of the absent statutory beneficiaries is the same as the citizenship of the defendant does not destroy complete diversity. *Harris v. Johnson*, 345 F. Supp. 516 (N.D. Miss. 1972).

In an action brought under Code 1942, § 1453 the citizenship of the personal representative of the decedent is determinative of the diversity issue. *Harris v. Johnson*, 345 F. Supp. 516 (N.D. Miss. 1972).

In a wrongful death action the citizenship of the administrator for the decedent is determinative on the issue of diversity. *Harris v. Johnson*, 345 F. Supp. 516 (N.D. Miss. 1972).

By the use of the word "may" in the phrase "all parties interested may join the suit" it is apparent that it is not mandatory that all interested persons join a wrongful death action, and thus the fact that 2 survivors resided in Mississippi did not defeat total diversity required for federal jurisdiction, since they were not necessary parties to the action. *Allen v. Baker*, 327 F. Supp. 706 (N.D. Miss. 1968).

Where the administratrix had made an election to sue for the death of her decedent under this section [Code 1942, § 1453], the mere reference to the Workmen's Compensation Act did not serve to convert the case to one based upon tort and the Act, so that the next of kin and beneficiaries would become necessary and indispensable parties, and, the federal court was not deprived of jurisdiction based upon diversity of citizenship on the theory that such beneficiaries and indispensable parties were citizens of the same state as the defendant. *Hordge v. Yeates*, 157 F. Supp. 411 (S.D. Miss. 1957).

Where administratrix did not institute suit for death of decedent, she was not necessary party to death action brought by widow and children of intestate. Mis-

Mississippi Power & Light Co. v. Smith, 169 Miss. 447, 153 So. 376 (1934).

16. Evidence.

In a wrongful death action, the decedent's "personal photo album" was admissible on the issue of damages where it was critical to the plaintiff's case to humanize the decedent and to demonstrate to the jury that the 85-year-old decedent was well and healthy prior to the accident. Additionally, testimony of friends of the decedent was essential to determine the state of the decedent's physical condition prior to his death, even though some of the testimony was duplicative of testimony given by the plaintiff and her son where the testimony of the plaintiff and her son was verified and corroborated by the testimony of the other witnesses who, unlike the plaintiff and her son, had no financial stake in the matter. *Motorola Communications & Elecs., Inc. v. Wilkerson*, 555 So. 2d 713 (Miss. 1989).

It was reversible error to admit investigating officer's testimony that no traffic citation was issued to tractor-trailer driver as result of incident resulting in death, of plaintiff's son; trial court also erred in refusing to admit evidence that decedent, 2 or 3 months before his death had attempted suicide by lying down in highway in path of truck. *Hughes v. Tupelo Oil Co.*, 510 So. 2d 502 (Miss. 1987).

Trial court erred in refusing to admit evidence that decedent's blood alcohol content, tested at request of investigating officer, was .15 percent, because statutory privilege in § 63-11-43 [Repealed] prohibiting admission, in civil trial, of blood alcohol tests taken pursuant to state's implied consent law, had been abrogated by adoption of Mississippi Rules of Evidence; officer who requested test did not have authority to do so, since implied consent law authorized blood alcohol test on dead or unconscious drivers whom investigating officer believed to have been operating motor vehicle while intoxicated, and there was no evidence that decedent had been operating motor vehicle; however, admission was proper because exclusion of this relevant evidence would have no deterrent effect on officer who ordered test, and would only penalize defendants.

Hughes v. Tupelo Oil Co., 510 So. 2d 502 (Miss. 1987).

Testimony of an expert in the field of economics as to the reasonable economic probability of a male similarly situated as was the decedent, was too speculative to be of any real value to the jury in making up a true verdict. *Mississippi Power & Light Co. v. Shepard*, 285 So. 2d 725, 82 A.L.R.3d 86 (Miss. 1973).

In wrongful death action where decedent succumbed when a television antenna he was erecting came into contact with defendant's power line, testimony of neighbor that some 6 years earlier her lights went off and she observed power company workers as they removed a television antenna belonging to another neighbor from the electric lines here involved, near the place where the second accident occurred, was admissible to show that antennas constructed since the power line was installed along the edge of the street, were likely to fall on the line and cause damage unless the power line was properly isolated, insulated or guarded so as to prevent injury upon contact with antennas along the street where defendant power company was licensed to operate. *Mississippi Power & Light Co. v. Shepard*, 285 So. 2d 725, 82 A.L.R.3d 86 (Miss. 1973).

Testimony showing any change in conditions on which a wrongful death action is based is competent as against the rights of the persons affected, and testimony may be introduced to show the remarriage of the widow after the death of the husband for which the suit is brought. *Campbell v. Schmidt*, 195 So. 2d 87 (Miss. 1967).

Doctrine of *res ipsa loquitur* does not apply in an action against restaurant operator for death of customer allegedly caused by ptomaine poisoning. *Goodwin v. Misticos*, 207 Miss. 361, 42 So. 2d 397 (1949).

A directed verdict for the defendant in a malpractice suit was sustained and the doctrine of *res ipsa loquitur* held not to apply where the only witness for the plaintiff was the mother of the deceased child who testified that the defendant performed a tonsillectomy upon the child and that the child died in the hospital shortly thereafter. *Sanders v. Smith*, 200 Miss. 551, 27 So. 2d 889 (1946).

Where, in action for death of child resulting from explosion of lamp predicated on negligence of defendant in supplying filling station with gasoline instead of kerosene, judgment in favor of plaintiff based upon testimony of twelve-year-old witness that he filled the lamp from the can which was brought from the filling station would impute wilful and corrupt perjury to nine adult witnesses, six of whom were disinterested and unimpeached, whose testimony exonerated defendant from any negligence, in the respect alleged, judgment was reversible as against the great weight of the evidence. *Standard Oil Co. v. Henley*, 199 Miss. 819, 25 So. 2d 400 (1946).

To recover damages in death action for physical pain and mental anguish suffered by deceased between time of accident and his death, plaintiff must sustain burden of proof that deceased retained consciousness after the accident. *Standard Oil Co. v. Crane*, 199 Miss. 69, 23 So. 2d 297 (1945), overruled on other grounds, *Hollingsworth v. Bovaird Supply Co.* 465 So. 2d 311 (Miss. 1985).

Dying declarations of decedent are not admissible in civil actions for wrongful death. *New Orleans & N.E.R. Co. v. Miles*, 197 Miss. 846, 20 So. 2d 657 (1945).

Where railroad company, defendant in action for death of pedestrian struck by train at crossing, took deposition of fireman because he was then in the armed forces, but did not introduce it, plaintiffs' use thereof, as if it had been introduced, in the examination of other witnesses, was improper. *New Orleans & N.E.R. Co. v. Miles*, 197 Miss. 846, 20 So. 2d 657 (1945).

Evidence, in action for death of pedestrian struck by train at crossing, that the fireman was drunk immediately after the accident, was inadmissible in the absence of showing that anything done or omitted by the fireman had any causal connection with the injury. *New Orleans & N.E.R. Co. v. Miles*, 197 Miss. 846, 20 So. 2d 657 (1945).

When a person is injured or killed on a public railroad crossing, the failure to ring the bell or sound the whistle as required by statute will raise the presumption prima facie that the injured person would have heard and acted upon the warning

had it been given, and that if an opposite conclusion is to be reached the burden is upon the railroad company to meet the presumption by proof. *New Orleans & N.E.R. Co. v. Miles*, 197 Miss. 846, 20 So. 2d 657 (1945).

Plaintiff has burden of showing in action against employer for employee's death that such was caused by the employer's negligence. *Proctor & Gamble Defense Corp. v. Bean*, 146 F.2d 598 (5th Cir. 1945).

A motorist may be found by the jury to have been in the exercise of due care and hence not liable under this statute [Code 1942, § 1453] for the death of a child where there is evidence that other vehicles obstructed his view in such a way that he could not see the child until close upon it. *Moser v. Hand*, 81 F.2d 522 (5th Cir. 1936).

Evidence that doctor was negligent in treating deceased for gunshot wound held insufficient to establish liability of doctor for wrongful death of deceased from pulmonary embolism. *Berryhill v. Nichols*, 171 Miss. 769, 158 So. 470 (1935).

Life expectancy of healthy men is competent evidence where the only infirmity of decedent was his deafness. *Mississippi Cent. R.R. v. Robinson*, 106 Miss. 896, 64 So. 838 (1914).

As to the competency of mortuary tables where the deceased was an asthmatic, and asthmatics were not embraced in such tables. *Mississippi Cotton Oil Co. v. Smith*, 95 Miss. 528, 48 So. 735 (1909).

In an action by an employee, claimed to have been injured by being thrown under a car while engaged in switching by stumbling over slag, it was competent for the railroad company to show that slag is commonly used by responsible railroad companies as ballast. *Southern Ry. v. McLellan*, 80 Miss. 700, 32 So. 283 (1902).

In such actions evidence to show the poverty of the plaintiff is not admissible. *Southern Ry. v. McLellan*, 80 Miss. 700, 32 So. 283 (1902).

Evidence that no previous accident had occurred at the same place was held admissible. And it was also held to be competent for defendant's attorneys to comment on the absence of evidence of any previous accident at the same place.

Southern Ry. v. McLellan, 80 Miss. 700, 32 So. 283 (1902).

Evidence that the train was short on hands and that plaintiff, a flagman, was performing extra duties, was inadmissible, there being no claim that shortness of hands contributed to the injury. *Southern Ry. v. McLellan*, 80 Miss. 700, 32 So. 283 (1902).

17. Questions for jury.

Circuit Court erred when it granted judgment for railroad notwithstanding verdict of jury where, while greater weight of credible evidence supported view that emergency whistle was sounded, there was in record some credible evidence that whistle never sounded. *Maxwell v. Illinois Cent. G.R.R.*, 513 So. 2d 901 (Miss. 1987).

In a civil suit seeking recovery of damages for the deaths of two persons and injuries to three others as a result of being struck by gunfire laid down by a detachment of officers who were on a college campus as a result of student disorders, there was sufficient evidence to submit to the jury questions as to whether the respective officers were privileged to fire in self-defense or to suppress a riot, whether they employed excessive deadly force or fired without due regard to the safety of others, whether any one or more of them was an actual cause of harm to any plaintiff, and whether any supervisory or command officers were liable. *Burton v. Waller*, 502 F.2d 1261 (5th Cir. 1974), cert. denied, 420 U.S. 964, 95 S. Ct. 1356, 43 L. Ed. 2d 442 (1975), reh'g denied, 421 U.S. 939, 95 S. Ct. 1668, 44 L. Ed. 2d 95 (1975).

Whether or not a defendant power company should have anticipated that person using due regard for their own safety in constructing, erecting and using television antennas in a congested area would likely come into contact with its dangerous powerlines so that it became its duty to isolate, insulate or guard its lines against the likelihood of such contact with its lines by the lawful use of the inhabitants and the issue as to the necessity of a warning and whether or not the power company failed to perform its duty in this regard were questions of fact for the jury. *Mississippi Power & Light Co. v. Shepard*,

285 So. 2d 725, 82 A.L.R.3d 86 (Miss. 1973).

The question of whether a general contractor, in constructing a wooden scaffolding for use of employees of a subcontractor who installed steel beams in a corridor, had provided a safe place for subcontractor's employees to work was one for the jury. *Oden Constr. Co. v. McPhail*, 228 So. 2d 586 (Miss. 1969).

Whether bus driver was negligent in failing to ascertain whereabouts of passenger who alighted from bus before starting bus and fatally striking her, was for the jury. *Gulf Trans. Co. v. Allen*, 209 Miss. 206, 46 So. 2d 436 (1950).

In action for death of five-year-old child by driver of car on highway, it was for jury to say whether child climbed over curb or entered highway through vent and if driver of car could have seen it in time to avoid accident if he had been keeping constant lookout and anticipating presence of pedestrians in highway as required by law. *Gordon v. Lee*, 208 Miss. 21, 43 So. 2d 665 (1949).

Whether operators of locomotive failed to give warning signals after they became aware of danger of pedestrian killed on tracks held, under evidence, for jury. *Young v. Columbus & G. Ry.*, 165 Miss. 287, 147 So. 342 (1933).

18. Instructions.

This section does not require that jury know identity of beneficiaries, therefore court need not have informed jury that plaintiff's children would have been primary beneficiaries of any wrongful death damages it awarded; court properly rejected plaintiff's argument that jury assumed that plaintiff would be sole recipient of damages and thus the interests of the children were unfairly prejudiced. *Munn v. Algee*, 924 F.2d 568 (5th Cir. 1991), cert. denied, 502 U.S. 900, 112 S. Ct. 277, 116 L. Ed. 2d 229 (1991).

In a wrongful death action arising from a collision between a truck and the decedent's automobile, the trial court's error in refusing a jury instruction that the defendant truck driver was negligent as a matter of law due to intoxication was cured by the jury finding in favor of the plaintiff. *Hasson v. Hale*, 555 So. 2d 1014 (Miss. 1990).

In a wrongful death action arising from a collision between a truck and the decedent's automobile, the trial court erred in granting a comparative negligence instruction where the only act of negligence claimed by the defendant truck driver was that the decedent drove her car onto his side of the highway since, if the jury had found the decedent negligent in driving onto the wrong side of the road, they would have been duty bound to find for the defendant. *Hasson v. Hale*, 555 So. 2d 1014 (Miss. 1990).

Instruction misrepresenting law concerning duty to stop train when trespasser's position of peril is recognized in time to stop train was unsupported by law; instruction failing to make clear that railroad's duty of reasonable care arose only when its engineer and firemen first saw decedent on railroad tracks was error; and, instruction should further tell jury that railroad's duty was to exercise reasonable care under particular circumstances with which it was confronted. *Maxwell v. Illinois Cent. G.R.R.*, 513 So. 2d 901 (Miss. 1987).

Electric power company's instruction to the effect that decedent was presumed to have seen an electric power line and to have known of its presence, was properly refused since there was no presumption to that effect, and moreover, such instruction was an attempt to instruct on the weight and worth of the evidence by adding an inference in violation of Code 1942, § 1530. *Mississippi Power & Light Co. v. Shepard*, 285 So. 2d 725, 82 A.L.R.3d 86 (Miss. 1973).

Plaintiff's instruction to the effect that an electric power company was required to maintain its lines in such a manner as to prevent it from being dangerous to the public, was erroneous since if it were required so to do, a power company would be an insurer against all injuries to persons and property. *Mississippi Power & Light Co. v. Shepard*, 285 So. 2d 725, 82 A.L.R.3d 86 (Miss. 1973).

In view of this provision, it is erroneous to give an instruction the effect of which is to permit one beneficiary's contributory negligence to be imputed to all the beneficiaries. *Delta Elec. Power Ass'n v. Burton*, 240 Miss. 209, 126 So. 2d 258 (1961),

error overruled, 240 Miss. 223, 126 So. 2d 866 (1961).

Instructing jury in death action that they may consider the present net cash value of deceased's life at the time of death is not error. *Ashcraft v. Alford*, 236 Miss. 25, 109 So. 2d 343 (1959).

In suit to recover for death of passenger killed while passing in front of bus after alighting, instructions when taken collectively that no liability attached until jury found that passenger's death was caused by driver's failure to keep a reasonable lookout, was proper. *Gulf Trans. Co. v. Allen*, 209 Miss. 206, 46 So. 2d 436 (1950).

Instruction authorizing jury to consider on question of damages the value of services of deceased to her husband, and the value of her association, society, and companionship to her husband and children, was proper. *Gulf Trans. Co. v. Allen*, 209 Miss. 206, 46 So. 2d 436 (1950).

In determining right of defendant to peremptory instruction to recover for death of customer allegedly caused by ptomaine poisoning, the court must assume as true everything which the evidence establishes either directly or by reasonable inferences which the jury might reasonably draw from such evidence, subject to the limitation, however, that a presumption cannot arise from another presumption. *Goodwin v. Misticos*, 207 Miss. 361, 42 So. 2d 397 (1949).

In action for death of child caused by negligent act of defendant, an instruction authorizing jury to take into consideration "any negligence on the part of the deceased child" is properly refused as the instruction fails to set forth elements of such negligence, if any, and its proximate contribution to injuries. *Stevenson v. Robinson*, 37 So. 2d 568 (Miss. 1948).

An instruction allowing jury to find negligence without giving a guide as to what specific acts or omissions within the pleadings and proof are sufficient to constitute actionable negligence, is erroneous. *New Orleans & N.E.R. Co. v. Miles*, 197 Miss. 846, 20 So. 2d 657 (1945).

Roving instructions, in action for wrongful death of pedestrian struck by train at crossing, authorizing recovery if jury believed from preponderance of the evidence that defendant railroad company

was guilty of any negligence which proximately caused or contributed to the injury, was erroneous, which error was not cured by other instructions charging jury that unless they believed from the evidence that decedent was struck at the crossing they must find for the defendant. *New Orleans & N.E.R. Co. v. Miles*, 197 Miss. 846, 20 So. 2d 657 (1945).

Where there was no evidence as to how accident occurred resulting in death of mechanic's helper allegedly caused by mechanic throwing can of flaming gasoline on him, trial court erred in refusing defendant employer's motion for directed verdict, but judgment would be reversed for a new trial rather than for a judgment notwithstanding the verdict in view of the confusion at the trial as to the status and effect of the pleadings. *Proctor & Gamble Defense Corp. v. Bean*, 146 F.2d 598 (5th Cir. 1945).

Instruction, in action by parents to recover for wrongful death of their two minor sons, that jury could also find for the plaintiffs for such "amount of money that the evidence shows that these boys might have voluntarily contributed to their parents after they reach 21 years of age," constituted reversible error, where there was no evidence to justify the instruction. *Alabama G.S.R.R. v. Johnson*, 140 F.2d 968 (5th Cir. 1944).

In view of the provisions of the statute that the "parties suing shall recover such damages as the jury may determine to be just" it is error to charge the jury that the damages to be awarded for the death of an infant "can never amount to what might be said to be substantial damages" and that unless the verdict should exceed the sum of \$2500 or \$3000 it would not be considered substantial damages. *Wood v. Morrow*, 119 F.2d 776 (5th Cir. 1941).

Instruction that plaintiffs were entitled to reasonable compensation for damages as proximate result of negligence of defendants in death of brother and son held not erroneous. *Gulf Ref. Co. v. Miller*, 153 Miss. 741, 121 So. 482 (1929).

In action for death of brother and son, instruction excluding loss of society and companionship as element of damages held properly refused. *Gulf Ref. Co. v. Miller*, 153 Miss. 741, 121 So. 482 (1929).

In action for death refusal of instruction that evidence did not authorize damages for loss of pecuniary profits to be derived after decedent became twenty-one held harmless error. *Gulf Ref. Co. v. Miller*, 153 Miss. 741, 121 So. 482 (1929).

Instruction authorizing recovery by mother and brother of deceased minor for present value of deceased's life expectancy held erroneous. *Gulf & S.I.R.R. v. Simmons*, 150 Miss. 506, 117 So. 345 (1928).

Peremptory instruction requested by defendant railroad company in action against it for running over and killing plaintiff's child was properly refused where there was evidence of defendant's negligence to go to the jury. *Alabama & V. Ry. Co. v. Lowe*, 73 Miss. 203, 19 So. 96 (1895).

19. Execution on judgment.

In execution on a judgment for the death of the father obtained by the widow, the children are co-plaintiffs with the widow and the sheriff owes them the same duty he does the widow if he knows of their interest. *Kelly v. Howard*, 98 Miss. 543, 54 So. 10 (1910); *Howard v. Kelly*, 111 Miss. 285, 71 So. 391 (1916).

19.5. Attorney fees.

In a wrongful death case, the original judge properly ordered that the decedent's two heirs join their lawsuits pursuant to Miss. Code Ann. § 11-7-13, but the adult heir was allowed to retain the attorneys the adult heir had chosen, and their work substantially contributed to the wrongful death settlement; thus, the adult heir's attorneys were entitled to attorneys' fees, and the appellate court rendered judgment holding that the attorneys would be paid for their work. *Franklin v. Franklin*, 858 So. 2d 110 (Miss. 2003).

Appellant attorneys were entitled to compensation based upon their contribution to the wrongful death case and their justifiable reliance on the first judge's order granting all attorneys a fee based on their contracts with their respective clients; thus, the second judge improperly denied them attorneys' fees. *Franklin v. Franklin*, — So. 2d —, 2002 Miss. LEXIS 321 (Miss. Oct. 31, 2002).

Attorney who substantially contributes to a wrongful death settlement should be compensated for the attorney's time and effort. *Franklin v. Franklin*, — So. 2d —, 2002 Miss. LEXIS 321 (Miss. Oct. 31, 2002).

There is no authority for the proposition that the wrongful death statute, Miss. Code Ann. § 11-7-13, does not allow heirs to be individually represented by counsel of their choice. *Franklin v. Franklin*, — So. 2d —, 2002 Miss. LEXIS 321 (Miss. Oct. 31, 2002).

An attorney who successfully prosecutes a wrongful death claim without representing all of the heirs must prove that the attorney has earned a fee from the proceeds distributed to all the heirs. *Franklin v. Franklin*, — So. 2d —, 2002 Miss. LEXIS 321 (Miss. Oct. 31, 2002).

20. Damages.

Trial court did not err in awarding hedonic damages in a wrongful death suit arising out of a collision between the decedent's vehicle and the corporation's tractor-trailer when death was instantaneous. *Choctaw Maid Farms, Inc. v. Hailey*, 822 So. 2d 911 (Miss. 2002).

Trial court properly distributed insurance settlement proceeds in wrongful death action to decedent's father, mother, half-sisters and half-brother, equally, without separate hearing in which each beneficiary could attempt to prove individual damages, and therefore, right to receive larger or smaller portion of insurance proceeds, since statute required that funds "shall be equally distributed." *Pannell v. Guess*, 671 So. 2d 1310 (Miss. 1996).

In a wrongful death action brought by the parents of a passenger who was killed in a motor vehicle accident, the parents were entitled to receive only the uninsured motor vehicle (UM) coverage provided by their own policies and the policy covering the accident vehicle, and were not entitled to the UM coverage provided by 2 other insurance policies issued to the owners of the accident vehicle which covered 2 other automobiles; the parents were entitled to stack the UM coverage provided by the policies in which the passenger met the definition of an "insured" either under the terms of the policy and/or

the UM statute, and the passenger was an "insured" only under the policy covering the accident vehicle since she was a guest passenger in that vehicle but was not a guest passenger in either of the other 2 vehicles covered under the other policies issued to the owners. *State Farm Mut. Auto. Ins. Co. v. Davis*, 613 So. 2d 1179 (Miss. 1992).

This section does not require that jury know identity of beneficiaries, therefore court need not have informed jury that plaintiff's children would have been primary beneficiaries of any wrongful death damages it awarded; court properly rejected plaintiff's argument that jury assumed that plaintiff would be sole recipient of damages and thus the interests of the children were unfairly prejudiced. *Munn v. Algee*, 924 F.2d 568 (5th Cir. 1991), cert. denied, 502 U.S. 900, 112 S. Ct. 277, 116 L. Ed. 2d 229 (1991).

A trial court erred in declining to grant a motion for a new trial on the issue of damages in a wrongful death action where the jury had failed to return any damages for the value of the decedent's life expectancy, the decedent's pain and suffering, and the loss of the decedent's companionship and society where an expert testified that the decedent's lost net income was \$70,495, the evidence was overwhelming that the decedent was alive and asking for help when he was inside the cab of a truck after the accident which caused his death, and the decedent's brother and sister testified as to the closeness of their family. *Jones v. Shaffer*, 573 So. 2d 740 (Miss. 1990).

In an action to recover under the uninsured motorist provisions of a decedent's policy brought by the decedent's 2 personal representatives, each representative was not entitled to recover "per person" limits under the policy since the representatives' status as insureds was due to their status as wrongful death beneficiaries under § 11-7-13, which provides a derivative action by the beneficiaries. Thus, the representatives' total recovery was limited to that amount to which the decedent would have been entitled, to be shared equally between them. *Wickline v. United States Fid. & Guar. Co.*, 530 So. 2d 708 (Miss. 1988).

Although automobile of tortfeasor who carries liability insurance in amount less than amount of coverage available to injured person under that person's uninsured motorist provisions of injured person's policies is "uninsured motor vehicle" by statutory definition (§ 83-11-103), uninsured motorist coverage may be reduced by offset for sums paid by another company on behalf of under-insured driver where uninsured motorist provision so provides; furthermore, although insurer's maximum liability is aggregate of all uninsured motorist policies under which injured person is covered, "per person" limitations in policies refer to injured person only, not to persons who may make claim under policy. *State Farm Mut. Auto. Ins. Co. v. Eubanks*, 620 F. Supp. 17 (N.D. Miss. 1985), *aff'd*, 785 F.2d 1346 (5th Cir. 1986).

A railroad employee leaving only a widow and minor children, a suit for damages may be brought by them only for damages for his death. *Mobile, J. & K.C.R. Co. v. Hicks*, 91 Miss. 273, 46 So. 360, 124 Am. St. R. 679 (1908), *aff'd*, 219 U.S. 35, 31 S. Ct. 136, 55 L. Ed. 78, Am. Ann. Cas. 1912A, 463 (1910).

21. —Elements of damages.

Hedonic damages are not available in a wrongful death action absent proof that the decedent survived long enough to suffer such damages. *Choctaw Maid Farms Inc. v. Hailey*, — So. 2d —, 2001 Miss. LEXIS 302 (Miss. Oct. 31, 2001).

The trial judge erred in finding that the plaintiff established no right to recover for loss of society and companionship arising from the death of her 23-year-old son, even in the absence of evidence of her own life expectancy, as she should have been allowed to recover for her past loss of society and companionship in the years between her son's death and the date of trial. *Gatlin v. Methodist Med. Ctr., Inc.*, 772 So. 2d 1023 (Miss. 2000).

The trial judge erred in refusing to allow the plaintiff to introduce evidence of funeral expenses for her son based on the fact that she could not establish that she had paid those expenses personally; such a showing is not a prerequisite for recovering funeral expenses in a wrongful

death case. *Gatlin v. Methodist Med. Ctr., Inc.*, 772 So. 2d 1023 (Miss. 2000).

Wrongful death action is to compensate beneficiary for loss of companionship and society of decedent, pain and suffering of decedent between time of injury and death, and punitive damages and, thus, beneficiary need only establish some of those elements in order to recover for decedent's wrongful death. *Penalver v. Howell*, 687 So. 2d 1171 (Miss. 1996), *reh'g denied* (Miss. Jan. 23, 1997).

Although adopted child might have had difficult time establishing certain damages in wrongful death suit arising from death of his natural father, particularly in establishing loss of love, society, companionship, loss of household services, loss of gifts, gratuities, remembrances, and support, he could nevertheless bring wrongful death action seeking present net cash value for father's life expectancy, loss of companionship and society of father, damages for father's pain and suffering between time of injury and death, and punitive damages. *Penalver v. Howell*, 687 So. 2d 1171 (Miss. 1996), *reh'g denied* (Miss. Jan. 23, 1997).

Momentary anxiety caused by anticipation of an accident does not support an award of damages for pain and suffering under the wrongful death statute. *M & M Pipe & Pressure Vessel Fabricators, Inc. v. Roberts*, 531 So. 2d 615 (Miss. 1988).

Under § 11-7-13, recoverable damages include the present net cash value of the life expectancy of the deceased, the loss of the companionship and society of the decedent, the pain and suffering of the decedent between the time of injury and death, and punitive damages. *McGowan v. Estate of Wright*, 524 So. 2d 308 (Miss. 1988).

Wrongful death statute (§ 11-7-13) does not provide for prejudgment interest on estimated earnings from time of decedent's death to time of trial. *Smith v. Industrial Constructors, Inc.*, 783 F.2d 1249 (5th Cir. 1986).

If the deceased is survived by wife, husband, child, father, mother, sister or brother and suit is brought by the personal representative of the deceased, all damages may be recovered in such suit, although the declaration should be in two

counts with reference to the damages sought, one count seeking damages recoverable by the survivors listed in the statute, with the other count seeking damages recoverable by the personal representative as assets of the estate such as damage to real or personal property, funeral expenses and medical expenses. *Thornton v. Insurance Co. of N. Am.*, 287 So. 2d 262 (Miss. 1973).

If the deceased is survived by wife, husband, child, father, mother, sister or brother and suit is brought by one of such persons, there can only be one suit for the benefit of all entitled to share in the distribution, and the damages recoverable in such suit are punitive damages, pain and suffering of the deceased and damages that his heirs might have suffered because of their personal relationship with the deceased, such as support and loss of companionship. *Thornton v. Insurance Co. of N. Am.*, 287 So. 2d 262 (Miss. 1973).

In an action by an administratrix to recover for the wrongful death of her eight-year-old decedent, who was killed when struck by a truck, the trial court's instruction that if the jury should find for the plaintiff, they might consider as a proper element of damages the present net cash value of the life of the deceased, if any, at the time of her death, was approved. *Reed v. State*, 232 Miss. 432, 99 So. 2d 455 (1958).

In an action to recover damages for death of a son, the elements which the jury may consider appear to be medical, ambulance, doctor and hospital expense paid, or incurred, by plaintiff, loss of companionship, the present net cash value of the life of deceased at the time of his death, and such damages as the jury may determine to be just, taking into consideration all the damages of every kind to the decedent and all the damages of every kind to the mother. *Boroughs v. Oliver*, 226 Miss. 609, 85 So. 2d 191 (1956).

In an action for wrongful death of a twenty-year-old boy in fixing the amount of the damage the jury should consider the present net cash value of the life of deceased at the time of his death. *Bush v. Watkins*, 224 Miss. 238, 80 So. 2d 19 (1955).

A husband is entitled to the services and earnings of his wife. *Gulf Trans. Co. v. Allen*, 209 Miss. 206, 46 So. 2d 436 (1950).

Surviving husband and children are entitled to recover for loss of society and companionship in death of their wife and mother, excluding damages by way of solatium. *Gulf Trans. Co. v. Allen*, 209 Miss. 206, 46 So. 2d 436 (1950).

In suit for death of five-year-old child brought by parents and the brothers and sisters, recovery may include value of services of child from time of death to majority, such damages as jury may fairly award as compensation for physical and mental anguish endured by such child between time of injury and death, such gratuities as parents had reasonable expectation of receiving before or after majority and whatever sum child might have recovered as present value of his own expectancy. *Gordon v. Lee*, 208 Miss. 21, 43 So. 2d 665 (1949).

Value of husband's support of wife and his association, society and companionship are proper elements of damage in death action. *Standard Oil Co. v. Crane*, 199 Miss. 69, 23 So. 2d 297 (1945), overruled on other grounds, *Hollingsworth v. Bovaird Supply Co.* 465 So. 2d 311 (Miss. 1985).

In death action, value of decedent's life expectancy is not proper element of damages. *Natchez Coca-Cola Bottling Co. v. Watson*, 160 Miss. 173, 133 So. 677 (1931).

In action under statute for death, proper parties may recover value of loss of decedent's companionship and society. *Gulf Ref. Co. v. Miller*, 153 Miss. 741, 121 So. 482 (1929).

In a suit where the claim for damages is limited to those of the decedent the net value of life expectancy cannot be recovered. *Belzoni Hardwood Co. v. Cinquimani*, 137 Miss. 72, 102 So. 470 (1924).

Damages for life expectancy and for the amount decedent would have expended in the support of his children during minority and for support of his wife during her lifetime and for loss of his society, protection and companionship cannot all be recovered. *New Deemer Mfg. Co. v. Alexander*, 122 Miss. 859, 85 So. 104 (1920); *Hines v. Moore*, 124 Miss. 500, 87 So. 1 (1921).

The surviving brothers and sisters may recover damages for loss of companion-

ship. *Gulf & S.I.R.R. v. Boone*, 120 Miss. 632, 82 So. 335 (1919), cert. denied, 251 U.S. 561, 40 S. Ct. 220, 64 L. Ed. 415 (1920), error dismissed, 252 U.S. 567, 40 S. Ct. 343, 67 L. Ed. 719 (1920).

They may also recover the present value of his life expectancy. *Gulf & S.I.R.R. v. Boone*, 120 Miss. 632, 82 So. 335 (1919), cert. denied, 251 U.S. 561, 40 S. Ct. 220, 64 L. Ed. 415 (1920), error dismissed, 252 U.S. 567, 40 S. Ct. 343, 67 L. Ed. 719 (1920).

There can be no damages for pain and suffering where death was instantaneous. *Illinois Cent. R.R. v. Fuller*, 106 Miss. 65, 63 So. 265 (1913).

In determining damages a jury may consider the loss of companionship, protection and society of the deceased but not solatium. *St. Louis & S.F. Ry. v. Moore*, 101 Miss. 768, 58 So. 471, Am. Ann. Cas. 1914B,597 (1912).

The value of life expectancy is an element of damages in an action by parent to recover damages for her son's death. *Mississippi Cotton Oil Co. v. Smith*, 95 Miss. 528, 48 So. 735 (1909).

Four elements of damages proper to be considered in an action by a parent to recover for the death of a minor child: (1) the value of the child's services from the time of its death until majority, (2) such damages as the jury may fairly award as compensation for the physical and mental anguish endured by the child between the time of injury and death, (3) such gratuities as the parent had a reasonable expectation of receiving before or after majority, and (4) whatever sum the child might have recovered as the present value of his own expectancy. *Cumberland Tel. & Tel. Co. v. Anderson*, 89 Miss. 732, 41 So. 263 (1906).

In a suit by a parent, loss of the child's society and comfort the parent would have had in rearing him are not elements of damages. *Mobile & O.R. Co. v. Watly*, 69 Miss. 145, 13 So. 825 (1891).

22. —Measure of damages.

In death action, plaintiff may recover present value of any pecuniary advantage which evidence discloses plaintiff might reasonably have expected from continuance of decedent's life. *Natchez Coca-*

Cola Bottling Co. v. Watson, 160 Miss. 173, 133 So. 677 (1931).

The present life expectancy of a decedent should be discounted six per cent, per annum for the period it has to run and there should be taken into account the living expenses of the deceased which must be deducted in determining damages for life expectancy of deceased. *Louisville & N.R. Co. v. Garnett*, 129 Miss. 795, 93 So. 241 (1922).

Recovery for services of a child would not extend beyond his minority. *Davis v. McCullers*, 126 Miss. 521, 89 So. 158 (1921).

Where the employment of a minor without his mother's consent constitutes an actionable wrong, her measure of damages can be no greater than if the master were guilty of negligence in the killing of the boy. *Kirkpatrick v. Ferguson-Palmer Co.*, 116 Miss. 874, 77 So. 803 (1918).

23. —Amount of damages.

In a wrongful death action arising from the death of an 85-year-old man in an automobile collision, a jury verdict in the amount of \$150,000 comported with the evidence and, therefore, a remittitur was not warranted where the damages awarded were not just for the wrongful death of the decedent because the decedent suffered severe pain, suffering and mental anguish for 2 months prior to death as a result of the injuries he sustained in the collision, the decedent had at least 7.3 years of life remaining according to life tables in effect at the time of his death, the plaintiff was the decedent's only child, and the plaintiff and the decedent were extremely close and communicated daily. *Motorola Communications & Elecs., Inc. v. Wilkerson*, 555 So. 2d 713 (Miss. 1989).

Wrongful death award based on future earnings of deceased should be reduced by amount of income tax deceased would have paid on earnings. *Smith v. Industrial Constructors, Inc.*, 783 F.2d 1249 (5th Cir. 1986).

A jury verdict for \$100,000 for the wrongful death of decedent who was 41 years of age, with a life expectancy of 31.29 years, who earned \$200 a week, and left surviving him a widow and two young children who were dependent upon him,

and the youngest of which was approximately two years old at the time of his death, was not so excessive as to indicate it was the result of passion or prejudice on the part of the jury. *Oden Constr. Co. v. McPhail*, 228 So. 2d 586 (Miss. 1969).

Where deceased was, during his lifetime, a healthy, strong operator of a cat-pillar tractor, skilled and earning an average wage of between \$55 and \$60 per week, was a good husband, and supported his wife and family, and had a life expectancy in excess of 40 additional years, and award of \$4500 to his wife was inadequate. *Campbell v. Schmidt*, 195 So. 2d 87 (Miss. 1967).

A jury award of \$150,000 for the injuries and death of a woman 44 years old at the time of the accident, with a husband and four children, who received hyperextension injury to her neck and a trauma to her left breast which caused the metastasis of a dormant cancer from which she died three years after the accident, and who was hospitalized for 222 days, was grossly excessive, and the affirmance of the judgment against the defendant was conditioned upon the acceptance of a remittitur of \$35,000. *New Orleans & N.R.R. v. Thornton*, 191 So. 2d 547 (Miss. 1966).

A verdict for \$75,000 for the wrongful death of a five-year-old child, with a life expectancy of 64 years, was excessive by \$35,000, and the Supreme Court would reverse the cause for new trial on issues of damages only unless plaintiffs entered a remittitur of \$35,000. *Bush Constr. Co. v. Walters*, 250 Miss. 384, 164 So. 2d 900 (1964).

Award of \$5000, for death of man of 55, with a life expectancy of 17.78 years, who suffered excruciating pain for 3 days before his death, held grossly inadequate. *City of Corinth v. Gilmore*, 236 Miss. 296, 110 So. 2d 606 (1959).

\$17,500 damages for death of 67 year old mother, held not excessive. *Ashcraft v. Alford*, 236 Miss. 25, 109 So. 2d 343 (1959).

A verdict in an action under this statute [Code 1942, § 1453] will not be set aside for inadequacy where its amount may be attributed to comparative negligence. *Matheny v. Illinois Cent. R.R.*, 235 Miss. 173, 108 So. 2d 589 (1959).

An award of \$3000 for the death of a 10-year-old boy killed in a highway accident was inadequate, even though that amount was probably uncollectible. *Green v. Hatcher*, 236 Miss. 830, 105 So. 2d 624 (1958).

An award of \$40,000 for the wrongful death of an eight-year-old child was not so excessive as to represent passion, prejudice and bias on the part of the jury. *Reed v. Eubanks*, 232 Miss. 27, 98 So. 2d 132 (1957).

In determining whether the damages awarded for wrongful death are excessive, the test on review is whether the verdict is so excessive as to be the result of bias, prejudice, or passion on the part of jury. *Bush v. Watkins*, 224 Miss. 238, 80 So. 2d 19 (1955).

An award of \$15,000 for the wrongful death of the decedent who had a life expectancy of thirty years and eight months was not so large as to evince passion or prejudice on the part of the jury. *Southern Pine Elec. Power Ass'n v. Denson*, 214 Miss. 397, 57 So. 2d 859 (1952), error overruled 214 Miss. 397, 59 So. 2d 75.

Where the deceased at the time of his death was forty-two years of age and left surviving him his widow and two children and where he spent in the support and maintenance of his family \$7,000 to \$8,000 a year, a verdict of \$47,000 by the jury is not so grossly excessive as to evince, bias, prejudice or passion. *Delta Chevrolet Co. v. Waid*, 211 Miss. 256, 51 So. 2d 443 (1951), overruled on other grounds, *Hollingsworth v. Bovaird Supply Co.*, 465 So. 2d 311 (1985).

Verdict of \$25,000 in favor of husband and three adult children for wrongful death of seventy-two year old woman was held excessive by \$7500. *Gulf Trans. Co. v. Allen*, 209 Miss. 206, 46 So. 2d 436 (1950).

Supreme Court in considering size of verdicts may take notice of inflationary conditions in the country with the consequent decrease in the purchasing value of money. *Gulf Trans. Co. v. Allen*, 209 Miss. 206, 46 So. 2d 436 (1950).

In action by parents and brothers and sisters for death of five-year-old child, verdict for \$2,000 is not adequate damages. *Gordon v. Lee*, 208 Miss. 21, 43 So. 2d 665 (1949).

Verdict for \$7,500.00 in action for death of child killed by truck on highway is excessive. *Stevenson v. Robinson*, 37 So. 2d 568 (Miss. 1948).

Verdict awarding widow \$15,000 for death of husband earning \$45 per week was excessive by \$10,000, where the husband had deserted the wife and had refused to support her. *Standard Oil Co. v. Crane*, 199 Miss. 69, 23 So. 2d 297 (1945), overruled on other grounds, *Hollingsworth v. Bovaird Supply Co.* 465 So. 2d 311 (Miss. 1985).

An instance of excessive verdict \$10,000.00 reduced to \$5,000.00. *Belzoni Hardwood Co. v. Cinquimani*, 137 Miss. 72, 102 So. 470 (1924).

An instance of inadequate damages awarded. *Belzoni Hardwood Co. v. Cinquimani*, 137 Miss. 72, 102 So. 470 (1924).

An instance of a verdict being grossly inadequate. *Huff v. Bear Creek Mill Co.*, 116 Miss. 509, 77 So. 306 (1918).

On the question of excessive verdict see *Yazoo & Miss. V. Ry. v. Farr*, 94 Miss. 557, 48 So. 520 (1909).

24.—Exemplary or punitive damages.

In a wrongful death action arising out of automobile collision occurring when defendant truck operator pulled out of the lane to pass a truck on a curve where he could not see an automobile approaching from the opposite direction, the question of whether the truck driver's conduct was gross or reckless negligence was a question for the jury in considering recovering of exemplary damages. *Bush v. Watkins*, 224 Miss. 238, 80 So. 2d 19 (1955).

If trespasser's death on railroad tracks resulted from engineer's failure to give warning signals after becoming aware of trespasser's danger, trespasser's administrator was entitled to have submitted to jury question of punitive damages, even if no actual damages were proved. *Young v. Columbus & G. Ry.*, 165 Miss. 287, 147 So. 342 (1933).

In proper cases exemplary as well as compensatory damages may be allowed. *Illinois Cent. R.R. v. Fuller*, 106 Miss. 65, 63 So. 265 (1913).

Punitive damages are properly disallowed in the absence of wantonness or gross negligence. *Carrier Lumber & Mfg.*

Co. v. Boxley, 103 Miss. 489, 60 So. 645 (1913).

25. Compromise, settlement and release.

Benefits payable under uninsured motorist insurance policy due to injuries resulting in death of insured need not be paid to persons-designated under wrongful death statute (§ 11-7-13), but may be paid to surviving spouse in accordance with "facility of payment" clause. *Overstreet v. Allstate Ins. Co.*, 474 So. 2d 572 (Miss. 1985).

Where a decedent's administrator settled a wrongful death suit against the tortfeasor without consideration of the rights of two minor children of the decedent who had been adopted by their paternal grandparents, the settlement did not bar the children from asserting their rights against the tortfeasor. *Alack v. Phelps*, 230 So. 2d 789 (Miss. 1970).

A decree on an ex parte petition to settle an alleged doubtful claim for wrongful death is not res judicata in a death action brought by a next of kin. *Evans v. Cheatwood*, 329 F.2d 583 (5th Cir. 1964).

Administrator can compromise and settle claim for death and execute valid release, where authorized by chancery court's decree. *Rowe v. Fair*, 157 Miss. 326, 128 So. 87 (1930).

Settlement by administrator of claim for wrongful death properly authorized by chancery court's decree, is binding on all interested parties. *Rowe v. Fair*, 157 Miss. 326, 128 So. 87 (1930).

Settlement for claim for death of 16-year-old boy for \$2,000 cash and house and lot, by administrators under chancery court's decree, held not inadequate. *Rowe v. Fair*, 157 Miss. 326, 128 So. 87 (1930).

Provision that determination of one suit for wrongful death shall not bar another action, unless decided on merits, does not apply where all parties interested acquiesced in settlement. *Rowe v. Fair*, 157 Miss. 326, 128 So. 87 (1930).

Widow's release of railroad from liability for death of husband and property damage did not bar action by lien creditor to recover balance of purchase price of automobile destroyed. *GMAC v. New Orleans & G.N.R. Co.*, 156 Miss. 122, 125 So. 541 (1930).

When the suit is brought by the widow for the death of a husband or father, she can compromise and thereby bind her children. *Natchez Cotton-Mills Co. v. Mullins*, 67 Miss. 672, 7 So. 542 (1890).

26. Res judicata.

Earlier federal lawsuit by survivors of workers who were killed in propylene gas explosion against manufacturer and bulk distributor of gas, in which defendants had been granted summary judgment, operated under doctrine of res judicata to bar state court action by survivors against downstream distributors of gas; subject matter in both actions was identical, causes of action were the same even though federal suit was labeled products liability case and state action was wrongful death action based on manufacturing defect, and downstream distributors were privies of bulk distributor and were of same quality or character. *Little v. V & G Welding Supply, Inc.*, 704 So. 2d 1336 (Miss. 1997).

27. Unborn child.

Miss. Code Ann. § 11-7-13 includes a nonviable fetus who is "quick" in the womb (i.e., has developed so that it moves within the mother's womb) as a "person"; the cause of action dates from the death of the fetus, and the determination of whether a fetus is "quick" in the womb is assigned to the jury. 66 Fed. Credit Union v. Tucker, 853 So. 2d 107 (Miss. 2003).

Where plaintiff sued defendants for causing her to miscarry while she was five months pregnant, the trial court properly denied partial summary judgment to defendants on her wrongful death claims, as

(1) under Miss. Code Ann. § 11-7-13, a nonviable, unborn child who was "quick" in the womb was a "person"; and (2) whether the child was "quick" was for the jury to decide. 66 Fed. Credit Union v. Tucker, 853 So. 2d 107 (Miss. 2003).

A non-viable fetus can recover for the death of a parent under the wrongful death statute. *Childs v. GMC*, 73 F. Supp. 2d 669 (N.D. Miss. 1999).

Wrongful death action can be maintained for death of unborn child who reaches prenatal age of viability. *Fizer v. Davis*, 706 So. 2d 244 (Miss. 1998).

Child who at time of his brother's death was unborn fetus, at six and one-half months gestation, was "living" at that time for purposes of wrongful death statute, and thus, he was beneficiary under that statute after his birth; medical evidence showed that, at time of his brother's death, child had reached prenatal age of viability when destruction of his mother's life would not necessarily mean end of his life. *Fizer v. Davis*, 706 So. 2d 244 (Miss. 1998).

29. Adopted child.

Finding that the half-brother of the decedent, who was adopted by another man, was entitled to a one-third share of the decedent's wrongful death settlement proceeds was proper where an adopted child had full rights to inherit from his natural family, just as if there had been no adoption; thus, the half-brother, as the natural half-brother, was a statutory heir-at-law and wrongful death beneficiary of the decedent. *Estate of Yount v. McKnight*, 845 So. 2d 724 (Miss. Ct. App. 2003).

RESEARCH REFERENCES

ALR. Instruction mentioning or suggesting specific sum as damages in action for personal injury or death. 2 A.L.R.2d 454.

Contributory negligence of parent as bar to an action by parent or administrator for death of child. 2 A.L.R.2d 785.

Contributory negligence of beneficiary as affecting action under death or survival statute. 2 A.L.R.2d 785.

Claim for wrongful death as subject of counterclaim or cross action in negligence

action against decedent's estate, and vice versa. 6 A.L.R.2d 256.

Liability for injury to or death of participant in game or contest. 7 A.L.R.2d 704.

Marriage of child, or probability of marriage, as affecting right or measure of recovery by parents in death action. 7 A.L.R.2d 1380.

Prenatal injury as ground of action. 10 A.L.R.2d 1059, 27 A.L.R.2d 1256.

Right of defendant in action for personal injury or death to bring in joint

tortfeasor for purpose of asserting right of contribution. 11 A.L.R.2d 228.

Civil liability for death by suicide. 11 A.L.R.2d 751.

Changes in cost of living or in purchasing power of money as affecting damages for personal injuries or death. 12 A.L.R.2d 611.

Death of or injury to occupant of airplane from collision or near collision with another aircraft. 12 A.L.R.2d 677.

Proof to establish or negative self-defense in civil action for death from intentional act. 17 A.L.R.2d 567.

Action against spouse or state for causing death of other spouse. 28 A.L.R.2d 662.

Right of action for wrongful death as subject to claims of creditors. 35 A.L.R.2d 1443.

Venue of wrongful death action. 36 A.L.R.2d 1146.

Effect of death of a beneficiary upon right of action under death statute. 43 A.L.R.2d 1291.

Effect of death of beneficiary upon right of action under death statute. 43 A.L.R.2d 1291.

Capacity of local or foreign representative to maintain death action under foreign statute providing for action by personal representative. 52 A.L.R.2d 1016.

Retroactive effect of statute changing distribution of recovery or settlement for wrongful death. 66 A.L.R.2d 1444.

Right of recovery, under wrongful death statute, for benefit of illegitimate child or children of decedent. 72 A.L.R.2d 1235.

Admissibility in wrongful death action of testimony of actuary or mathematician to establish present worth of pecuniary loss. 79 A.L.R.2d 259.

Admissibility, in death action for benefit of minor children, of evidence of decedent's desertion, nonsupport, abandonment, etc., of children. 79 A.L.R.2d 819.

Damages for wrongful death of husband or father as affected by receipt of social security benefits. 84 A.L.R.2d 764.

Wrongful death damages for loss of expectancy of inheritance from decedent. 91 A.L.R.2d 477.

Conflict of laws as to measure or amount of damages in death actions. 92 A.L.R.2d 1180.

Action for death of adoptive parent, by or for benefit of adopted or equitably adopted child. 94 A.L.R.2d 1237.

Fact that tortfeasor is member of class of beneficiaries as affecting right to maintain action for wrongful death. 95 A.L.R.2d 585.

What law governs right to contribution or indemnity between tortfeasors. 95 A.L.R.2d 1096.

Time from which statute of limitations begins to run against cause of action for wrongful death. 97 A.L.R.2d 1151.

Action for death of unborn child. 15 A.L.R.3d 992.

Rescue doctrine: applicability to situation created by breach of warranty. 44 A.L.R.3d 473.

Profits of business as factor in determining loss of earnings or earning capacity in action for personal injury or death. 45 A.L.R.3d 345.

Liability of governmental entity or public official for personal injury or damages arising out of vehicular accident due to negligent or defective design of a highway. 45 A.L.R.3d 875.

Parent's desertion, abandonment, or failure to support minor child as affecting right or measure of recovery for wrongful death of child. 53 A.L.R.3d 566.

Modern status of rule denying a common-law recovery for wrongful death. 61 A.L.R.3d 906.

Death action by or in favor of parent against unemancipated child. 62 A.L.R.3d 1299.

Action for death of stepparent by or for benefit of stepchild. 68 A.L.R.3d 1220.

Remarriage of surviving parent as affecting action for wrongful death of child. 69 A.L.R.3d 1038.

Right of spouse to maintain action for wrongful death as affected by fact that injury resulting in death accrued before marriage. 69 A.L.R.3d 1046.

Carrier's liability for injury or death of infant passenger as affected by fact that child was in custody of parent or other adult. 74 A.L.R.3d 1171.

Recovery, in action for benefit of decedent's estate in jurisdiction which has both wrongful death and survival statutes, of value on earnings decedent would have made after death. 76 A.L.R.3d 125.

Recovery for mental or emotional distress resulting from injury to, death of, member of plaintiff's family arising from physician's or hospital's wrongful conduct. 77 A.L.R.3d 447.

Admissibility and sufficiency of proof of value of housewife's services, in wrongful death action. 77 A.L.R.3d 1175.

Right of illegitimate child, after *Levy v. Louisiana*, to recover under wrongful death statute for death of putative father. 78 A.L.R.3d 1230.

Action against parent by or on behalf of unemancipated minor child for wrongful death of other parent. 87 A.L.R.3d 849.

Liability for child's personal injuries or death resulting from tort committed against child's mother before child was conceived. 91 A.L.R.3d 316.

Elements and measure of damages for breach of warranty in sale of horse. 91 A.L.R.3d 419.

Doctrine of *forum non conveniens*: assumption or denial of jurisdiction in action between nonresident individuals based upon tort occurring within forum state. 92 A.L.R.3d 797.

Validity of release of prospective right to wrongful death action. 92 A.L.R.3d 1232.

Judgment in death action as precluding subsequent personal injury action by potential beneficiary of death action, or vice versa. 94 A.L.R.3d 676.

Effect of death of beneficiary upon right of action under death statute. 13 A.L.R.4th 1060.

Propriety of taking income tax into consideration in fixing damages in personal injury or death action. 16 A.L.R.4th 589.

Judgment in favor of, or adverse to, person injured as barring action for his death. 26 A.L.R.4th 1264.

Exterminator's tort liability for personal injury or death directly resulting from operations. 29 A.L.R.4th 987.

State or local governmental unit's liability for injury to private highway construction worker based on its own negligence. 29 A.L.R.4th 1188.

Excessiveness or adequacy of damages awarded for personal injuries resulting in death of homemaker. 47 A.L.R.4th 100.

Excessiveness or adequacy of damages awarded for personal injuries resulting in

death of persons engaged in trades and manual occupations. 47 A.L.R.4th 134.

Excessiveness or adequacy of damages awarded for personal injuries resulting in death of retired persons. 48 A.L.R.4th 229.

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Excessiveness or adequacy of damages awarded for personal injuries resulting in death of persons engaged in professional, white-collar, and nonmanual occupations. 50 A.L.R.4th 787.

Wrongful death: surviving parent's minority as tolling limitation period on suit for child's wrongful death. 54 A.L.R.4th 362.

Excessiveness or adequacy of damages awarded for noneconomic loss caused by personal injury or death of parent. 61 A.L.R.4th 251.

Excessiveness or adequacy of damages awarded for noneconomic loss caused by personal injury or death of spouse. 61 A.L.R.4th 309.

Excessiveness or adequacy of damages awarded for parents' noneconomic loss caused by personal injury or death of child. 61 A.L.R.4th 413.

Effect of death of beneficiary, following wrongful death, upon damages. 73 A.L.R.4th 441.

When is death "instantaneous" for purposes of wrongful death or survival action. 75 A.L.R.4th 151.

Recovery of damages for loss of consortium resulting from death of child-modern status. 77 A.L.R.4th 411.

Products liability: cigarettes and other tobacco products. 36 A.L.R.5th 541.

Wrongful death damages for loss of expectancy of inheritance from decedent. 42 A.L.R.5th 465.

Failure to use or misuse of automobile child safety seat or restraint system as affecting recovery for personal injury or death. 46 A.L.R.5th 557.

Presumption or inference that accidental death of employee engaged in occupation of manufacturing or processing arose out of and in course of employment. 47 A.L.R.5th 801.

Causes of action governed by limitations period in UCC § 2-725. 49 A.L.R.5th 1.

Liability of owner of wires, poles, or structures struck by aircraft for resulting injury or damage. 49 A.L.R.5th 659.

Products liability: Recovery for injury or death resulting from intentional inhalation of product's fumes or vapors to produce intoxicating or similar effect. 50 A.L.R.5th 275.

Liability of health maintenance organizations (HMOs) for negligence of member physicians. 51 A.L.R.5th 271.

The government-contractor defense to state products-liability claims. 53 A.L.R.5th 535.

Validity, construction, and effect of agreement exempting operator of amusement facility from liability for personal injury or death or patron. 54 A.L.R.5th 513.

Prosecution of mother for prenatal substance abuse based on endangerment of or delivery of controlled substance to child. 70 A.L.R.5th 461.

Skier's liability for injuries to or death of another person. 75 A.L.R.5th 583.

Who, Other Than Parent, May Recover For Loss of Consortium on Death of Minor Child. 84 A.L.R.5th 687.

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§ 11-7-15. Contributory negligence no bar to recovery of damages; jury may reduce damages.

In all actions hereafter brought for personal injuries, or where such injuries have resulted in death, or for injury to property, the fact that the person injured, or the owner of the property, or person having control over the property may have been guilty of contributory negligence shall not bar a recovery, but damages shall be diminished by the jury in proportion to the amount of negligence attributable to the person injured, or the owner of the property, or the person having control over the property.

SOURCES: Laws, 1910, ch. 135; Codes, Hemingway's 1917, § 502; Laws, 1920, ch. 312; Laws, 1930, § 511; Laws, 1942, § 1454.

Cross References — Liability of railroad company for negligence and mismanagement, see §§ 77-9-435 et seq.

Exemption of personal injury judgment from execution for debt, see §§ 85-3-3 et seq.

JUDICIAL DECISIONS

1. In general.
2. Construction and application, generally.
3. Contributory negligence in general.
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9. Instructions.
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11. Damages.
12. —Amount of damages.

1. In general.

The "open and obvious" defense to negligence actions would be abolished, and damages would be determined through application of the true comparative negligence doctrine; thus, a trial judge erred in construing the open and obvious defense as a complete bar to the recovery of damages, since it should only be used to mitigate damages on a comparative negli-

gence basis under § 11-7-15. *Tharp v. Bunge Corp.*, 641 So. 2d 20 (Miss. 1994).

Under the comparative negligence doctrine, negligence is measured in terms of a percentage, and any damages allowed shall be diminished in proportion to the amount of negligence attributable to the person for whose injury, damage or death recovery is sought; where negligence by both parties is concurrent and contributes to the injury, recovery is not barred, but the plaintiff's damages are diminished proportionately, and therefore a plaintiff, though negligent, may still recover from a defendant whose negligence contributed to his or her injuries. *Burton ex rel. Bradford v. Barnett*, 615 So. 2d 580 (Miss. 1993).

A court should not, by its decree, fail to give effect to the statute. *Herrington v. Hodges*, 249 Miss. 131, 161 So. 2d 194 (1964).

A common-law rule as to contributory negligence may be modified or abolished

by statute. *Hines v. McCullers*, 121 Miss. 666, 83 So. 734 (1920).

This statute [Code 1942, § 1454] is not unconstitutional. *Natchez & S.R. Co. v. Crawford*, 99 Miss. 697, 55 So. 596 (1911).

2. Construction and application, generally.

Comparative negligence is applicable to an action sounding in strict liability. *Pickering v. Industria Masina I Traktora*, 740 So. 2d 836 (Miss. 1999).

From the points of view of both civil justice and economic efficiency, comparative negligence, as an approach to the effect that ought to be given a plaintiff's contributory fault, is demonstrably superior to the traditional common law contributory negligence bar. Thus, although Tennessee law controlled several other liability issues in a wrongful death action, the effect of the decedent's negligence, if any, would be governed by § 11-7-15 to the exclusion of the Tennessee contributory negligence rule. *McDaniel v. Ritter*, 556 So. 2d 303 (Miss. 1989).

In a wrongful death action brought by a minor decedent's parents, defendant was not entitled to contribution from the child's father, even though he was a joint tortfeasor, where the child could not have sued his father for damages had death not ensued; further, a diminution of damages was available only when the injured party, not a statutory beneficiary, had been contributorily negligent. *Hood v. Dealers Transp. Co.*, 472 F. Supp. 250 (N.D. Miss. 1979).

In an action arising out of a train/car collision at a railroad crossing, a finding that the train crew had a "better chance" to avoid the collision did not preclude consideration of plaintiff's contributory negligence in failing to stop at a stop sign which should have been visible to him. *Newman v. Missouri Pac. R.R.*, 421 F. Supp. 488 (S.D. Miss. 1976), *aff'd* in part, *rev'd* in part on other grounds, 545 F.2d 439 (5th Cir. 1977), *reh'g* denied, 551 F.2d 863 (5th Cir. 1977).

Code 1942, § 1454, has no application where the negligence of the injured person is the sole proximate cause of the injury, or where the sole proximate cause of the accident is the defendant's negligence.

Salster v. Singer Sewing Mach. Co., 361 F. Supp. 1056 (N.D. Miss. 1973).

Settlement by the railroad company of an action for damages brought by the estate of the driver of a petroleum tank truck, killed as the result of a railroad crossing collision, was no more and no less than a non-litigated, court-approved compromise effectuated to avoid the risk of litigation and did not establish, conclusively or otherwise, that the negligence of the railroad far exceeded that of the truck driver so as to collaterally estop the railroad from collecting property damages from the driver's principals. *Standard Oil Co. v. Illinois Cent. R.R.*, 421 F.2d 201 (5th Cir. 1969).

Although the question of contributory negligence was not involved in an action for the wrongful death of a passenger in an automobile, it was an issue in a subsequent case arising from the same collision brought for the wrongful death of the driver of the automobile in which the passenger was riding. *Bush Constr. Co. v. Walters*, 254 Miss. 266, 179 So. 2d 188 (1965).

The fact that the defendant railroad had previously recovered in federal court a judgment for damage sustained by its locomotive as a consequence of a collision with a truck driven by the plaintiff is no bar, under this section [Code 1942, § 1454], to plaintiff's recovery of a judgment for the personal injuries he sustained in the accident. *New Orleans & N.E.R. Co. v. Gable*, 252 Miss. 605, 172 So. 2d 421 (1965).

Motion to correct judgment. *Mississippi Power & Light Co. v. Walters*, 248 Miss. 206, 158 So. 2d 2 (1963), corrected, 248 Miss. 268, 160 So. 2d 908 (1964).

This provision [Code 1942, § 1454] includes the question of proximate cause as well as negligence. *Massengale v. Taylor*, 246 Miss. 521, 150 So. 2d 859 (1963).

Plaintiff's voluntary intoxication having contributed to accidental fall down dangerous steps. *Fournier v. United States*, 220 F. Supp. 752 (S.D. Miss. 1963).

The comparative negligence statutes does not apply where the only negligence shown is that of plaintiff. *Camurati v. Sutton*, 48 Tenn. App. 54, 342 S.W.2d 732 (1960).

The right to take comparative negligence into account may justify an otherwise inadequate verdict. *Matheny v. Illinois Cent. R.R.*, 235 Miss. 173, 108 So. 2d 589 (1959).

This section [Code 1942, § 1454] is not in conflict with the statute which provides that where each party is found to have a claim against the other, verdict shall be rendered for the excess. *Johnson v. Richardson*, 234 Miss. 849, 108 So. 2d 194 (1959).

Under this section [Code 1942, § 1454] and Code 1942, § 1456 abolishing doctrine of assumption of risk, when negligence once has been shown on part of master followed by injury to servant, the only way master can entirely escape liability is to show his negligence was not a proximate cause of the injury or that the servant's own negligence, or negligence of fellow-servant, was the sole proximate cause of the plaintiff's injury. *Oakes v. Mohon*, 208 Miss. 478, 44 So. 2d 551 (1950).

The doctrine of assumption of risk, not that of contributory negligence, was applicable where the deceased rode in the front seat with the drunken driver of a truck, which he knew was not equipped to haul passengers, without objection or effort to leave the truck. *Saxton v. Rose*, 201 Miss. 814, 29 So. 2d 646 (1947).

When the proximate cause of employee's injuries is the failure of the employee to use an instrumentality in the normal or proper way, such failure goes to the entire cause of action, and not to a mere diminution of damages. *Stewart v. Kroger Grocery, Co.*, 198 Miss. 371, 21 So. 2d 912 (1945).

This statute [Code 1942, § 1454], when invoked, does not leave it to the option of court or jury to disregard or absolve contributory negligence when shown, but the duty of the jury in such cases is made mandatory. *Moore v. Abdalla*, 197 Miss. 125, 19 So. 2d 502 (1944).

Where defendant's driver was grossly negligent in entering intersection at 50 miles per hour without stopping, and collided with plaintiff's driver who, in entering the intersection on a through street at unabated speed of 30 miles per hour, was prima facie negligent, the negligence of

plaintiff's driver was a contributing factor to the accident and warranted application of the comparative negligence statute. *Moore v. Abdalla*, 197 Miss. 125, 19 So. 2d 502 (1944).

Code 1930, §§ 511 and 512, Code 1942, §§ 1454 and 1455, abolished contributory negligence as a defense and makes negligence and contributory negligence questions for the jury to determine. *Mississippi Power & Light Co. v. Merritt*, 194 Miss. 794, 12 So. 2d 527 (1943).

This section [Code 1942, § 1454] is not applicable to a depositor's action against the bank for damage to credit and reputation resulting from improper dishonoring of checks. *Weaver v. Grenada Bank*, 180 Miss. 876, 179 So. 564 (1938).

This statute [Code 1942, § 1454] is part of the substantive law of Mississippi and must be followed by the Federal Court sitting in that state. *Mississippi Power & Light Co. v. Whitescarver*, 68 F.2d 928 (5th Cir. 1934); *Railway Exp. Agency v. Mallory*, 168 F.2d 426 (5th Cir. 1948), cert. denied, 335 U.S. 824, 69 S. Ct. 48, 93 L. Ed. 378 (1948).

This statute [Code 1942, § 1454] does not deal with degrees of contributory negligence, but merely with contributory negligence of every character. *Yazoo & Miss. V. Ry. v. Carroll*, 103 Miss. 830, 60 So. 1013 (1913); *Mississippi Cent. R.R. v. Robinson*, 106 Miss. 896, 64 So. 838 (1914).

Common-law rule that master is not liable to servant for defects in simple tools held not changed by this section [Code 1942, § 1454]. *Jones v. Southern United Ice Co.*, 167 Miss. 886, 150 So. 652 (1933); *Middleton v. National Box Co.*, 38 F.2d 89 (D.C. 1930).

In an action for the death of a bus passenger resulting from a collision between the bus and a train, negligence of the bus driver could not be imputed to the passenger. *Gulf & S.I.R.R. v. Carlson*, 137 Miss. 613, 102 So. 168 (1924).

This statute [Code 1942, § 1454] does not repeal other statutes regulating the conduct of a railroad company. *Mobile & O.R. Co. v. Campbell*, 114 Miss. 803, 75 So. 554 (1917).

This statute [Code 1942, § 1454] does not deal with degrees of contributory negligence, but merely with contributory neg-

ligence of every character. *Yazoo & Miss. V. Ry. v. Carroll*, 103 Miss. 830, 60 So. 1013 (1913); *Mississippi Cent. R.R. v. Robinson*, 106 Miss. 896, 64 So. 838 (1914).

3. Contributory negligence in general.

In an action to recover for injuries sustained on a construction site, even if the plaintiff was contributorily negligent in attempting to walk across a dark basement, that would not bar recovery under the comparative negligence statute if the defendant also failed in its obligations to someone in the plaintiff's status. *Jackson v. W.G. Yates & Sons Constr. Co.*, — So. 2d —, 1998 Miss. App. LEXIS 827 (Miss. Ct. App. Oct. 13, 1998).

A minor child between the ages of 7 and 14 years is *prima facie* presumed not to be possessed of sufficient discretion to make him or her guilty of contributory negligence, and thus the defendant who raises the defense of contributory negligence has a greater burden to prove the defense than in a case where the plaintiff is not a minor child. *Glorioso v. YMCA*, 556 So. 2d 293 (Miss. 1989).

A loss of consortium action is derivative, and contributory negligence applies, because the action lies on account of injuries to the other spouse. Thus, an award to a wife for loss of consortium should have been reduced by the contributory negligence of her husband. *Choctaw, Inc. v. Wichner*, 521 So. 2d 878 (Miss. 1988), answer to certified question conformed to, 842 F.2d 1511 (5th Cir. 1988).

Contributory negligence of plaintiffs' decedent, if any, would only diminish the amount of damages to be awarded plaintiffs. *Norris v. Board of Trustees*, 300 So. 2d 913 (Miss. 1974).

Where assumption of risk overlaps and coincides with contributory negligence the rules of the defense of contributory negligence shall apply. *Braswell v. Economy Supply Co.*, 281 So. 2d 669 (Miss. 1973).

Where two Mississippi motorists were killed in an automobile collision which occurred in Louisiana, their estates were being administered in Mississippi, and their administratrices had respectively filed in a Mississippi court an action and counterclaim for damages as a consequence of the deaths of the decedents, the

issues of liability under both the declaration and counterclaim should have been submitted to the jury by appropriate instructions under the Mississippi comparative negligence statute, despite the fact that the law of Louisiana, where the fatal collision occurred, barred a recovery where contributory negligence is established. *Mitchell v. Craft*, 211 So. 2d 509 (Miss. 1968).

Where the court properly instructed the jury in accord with the Mississippi statute of comparative negligence, it must be assumed that the jury considered the effect of any contributory negligence in reaching the amount of its verdict. *Bill Hunter Truck Lines v. Jernigan*, 384 F.2d 361 (5th Cir. 1967).

Code 1942, § 8215 should be construed in a practical manner, and it does not mean that a motorist forced to stop momentarily upon the paved portion of a highway because the vehicle in front of him stopped and oncoming traffic prevented him from passing is guilty of negligence in not immediately driving from the highway onto the shoulder. *Whitten v. Land*, 188 So. 2d 246 (Miss. 1966).

In view of this statute, contributory negligence does not absolutely bar recovery of damages. *Arnold Servs., Inc. v. Delta Motor Lines*, 325 F.2d 860 (5th Cir. 1963).

Where the negligence of the railroad and plaintiffs' decedent were concurring causes, each being a proximate cause of the accident, the negligence of plaintiffs' decedent did not bar recovery, but only served to diminish the damages of his next of kin. *Illinois Cent. R.R. v. Williams*, 242 Miss. 586, 135 So. 2d 831 (1961).

Although contributory negligence is a ground for reduction of damages, it will not bar recovery. *Illinois Cent. R.R. v. Farris*, 259 F.2d 445, 67 A.L.R.2d 1358 (5th Cir. 1958).

That driver of pulpwood truck, in which plaintiff was riding, was violating Code 1942, § 8181, by having a portion of the truck on the left side of the highway at the time of colliding with a pickup truck which was coming out of a driveway, would under the comparative negligence statute only constitute contributory negligence which would cause damages to be

reduced, and a mere violation of the law in the operation of a motor vehicle would not entitle the opposite party to a peremptory instruction. *Winfield v. Magee*, 232 Miss. 57, 98 So. 2d 130 (1957).

It is well settled that a child between the ages of 7 and 14 years is *prima facie* presumed not to be possessed of sufficient discretion to make him guilty of contributory negligence in failing to exercise due care for his own safety. *Moak v. Black*, 230 Miss. 337, 92 So. 2d 845 (1957).

Even if the farm equipment mechanic had been guilty of contributory negligence, still if the owner had failed to warn the mechanic of the dangerous condition of the owner's cotton picker, about which owner knew or should have known, prior to the mechanic's beginning work thereon, and the mechanic sustained injury while working on the machine, a jury issue was presented in an action by the mechanic against the owner. *Cole v. Tullos*, 228 Miss. 815, 90 So. 2d 32 (1956).

In an action for personal injuries where the plaintiff's car ran into defendant's truck parked on the highway the court did not err in refusing to give an instruction to the defendant that the plaintiff, as a matter of law, was guilty of contributory negligence, as the instruction was not based upon the contributory negligence statute. *Planters Whse. Grocery v. Kincade*, 210 Miss. 712, 50 So. 2d 578 (1951).

Master is liable to servant when servant is injured in carrying out negligent order of foreman when danger is not so imminent that no person of ordinary prudence would have encountered it, even under orders, and there is no assumption of risk by servant where master is negligent, and contributory negligence is not bar to a recovery, such negligence being only for proper consideration in mitigation of damages. *Oakes v. Mohon*, 208 Miss. 478, 44 So. 2d 551 (1950).

Contributory negligence is not a defense to action based on fraud. *Reed v. Charping*, 207 Miss. 1, 41 So. 2d 11 (1949).

Municipality's duty to keep the streets in a reasonably safe condition for use by persons exercising reasonable care and caution for their own safety does not imply that contributory negligence of an injured person would bar recovery, for such impli-

cation would be in violation of this section [Code 1942, § 1454]. *Owens v. Town of Booneville*, 206 Miss. 345, 40 So. 2d 158 (1949).

An action in this state by a passenger against a foreign corporation, operating a motor transportation line in this state, to recover for injury sustained in Louisiana, would not be enjoined on the ground that contributory negligence is a complete defense in Louisiana and only a *pro tanto* defense in this state, since the courts of this state will apply the substantive law of Louisiana, including that of contributory negligence, in the trial of the case in this state. *Tri-State Transit Co. v. Mondy*, 194 Miss. 714, 12 So. 2d 920 (1943).

The fact that the negligence of the plaintiff in a negligence action against a municipality contributed to the accident would not wholly bar him from recovery under this section [Code 1942, § 1454]. *Birdsong v. City of Clarksdale*, 191 Miss. 532, 3 So. 2d 827 (1941).

Under this statute [Code 1942, § 1454] contributory negligence is not an absolute defense. *C.C. Moore Constr. Co. v. Hayes*, 119 F.2d 742 (5th Cir. 1941), cert. denied, 314 U.S. 642, 62 S. Ct. 82, 86 L. Ed. 515 (1941).

Under this statute [Code 1942, § 1454] contributory negligence is not a defense to suits by employees. *Montgomery Ward & Co. v. Lindsey*, 104 F.2d 882 (5th Cir. 1939).

Contributory negligence will not bar recovery, irrespective of degree. *Crosby Lumber & Mfg. Co. v. Durham*, 181 Miss. 559, 179 So. 285 (1938), error overruled, 181 Miss. 573, 179 So. 854 (1938).

Under this provision [Code 1942, § 1454] contributory negligence is not a total defense. *Southern Kraft Corp. v. Parnell*, 65 F.2d 785 (5th Cir. 1933).

Damages on account of unsafe place to work are permissible notwithstanding contributory negligence. *Sea Food Co. v. Alves*, 117 Miss. 1, 77 So. 857 (1918).

Circumstance under which a minor is not guilty of contributory negligence. *Walker Bros. v. Nix*, 115 Miss. 199, 76 So. 143 (1917), modified, 76 So. 563 (Miss. 1917).

4. Pleading and proof.

One not pleading contributory negligence is not entitled to an instruction

thereon, though the proof shows contributory negligence sufficiently for consideration by the jury. *Herrington v. Hodges*, 249 Miss. 131, 161 So. 2d 194 (1964).

Contributory negligence of the person injured or killed is an affirmative defense which must be pleaded and proved, and if a defendant wishes to have a jury instructed with reference thereto, he should request such an instruction. *Jefferson v. Pinson*, 219 Miss. 427, 69 So. 2d 234 (1954).

Under Mississippi law a defendant may not have the advantage of this section [Code 1942, § 1454] unless he pleads contributory negligence and requests an instruction on comparative negligence and diminution of damages. *Railway Exp. Agency v. Mallory*, 168 F.2d 426 (5th Cir. 1948), cert. denied, 335 U.S. 824, 69 S. Ct. 48, 93 L. Ed. 378 (1948).

A defendant neither pleading nor requesting instruction as to contributory negligence cannot rely on contributory negligence as a defense on appeal. *Gulf & S.I.R.R. v. Saucier*, 139 Miss. 497, 104 So. 180 (1925).

A defense of contributory negligence must be specially pleaded and the burden of proving same is on the defendant. *Yazoo & Miss. V. Ry. v. Lucken*, 137 Miss. 572, 102 So. 393 (1925); *Mobile & O.R. Co. v. Campbell*, 114 Miss. 803, 75 So. 554 (1917).

5. Effect of negligence of defendant.

Plaintiff may still recover from defendant whose negligence proximately caused or contributed to plaintiff's injury even though plaintiff was himself negligent. *Blackmon v. Payne*, 510 So. 2d 483 (Miss. 1987).

Although a plaintiff may be guilty of negligence he may still recover from a defendant who is guilty of negligence which proximately caused or contributed to plaintiff's injury, but such recovery may not be had where plaintiff's negligence is the sole proximate cause of the injury. *Evans v. Journeay*, 488 So. 2d 797 (Miss. 1986).

A defendant in an automobile collision case would not be absolved from liability altogether, if both parties were negligent equally, but plaintiff's damages would be reduced by 50 percent. *First Nat'l Bank v.*

Mississippi State Hwy. Comm'n, 227 So. 2d 118 (Miss. 1969).

Gross negligence of plaintiff in jumping from train while it was running at rate of speed which he judged to be fifteen miles per hour instead of remaining on train until carried to next station is not bar to recovery of damages for injuries sustained, if negligence of defendant railroad, or its violation of duty owed to him in starting train before he had reasonable time to get off, was continuing as a contributing cause of his jumping off moving train and sustaining such injuries. *McClellan v. Illinois Cent. R.R.*, 204 Miss. 432, 37 So. 2d 738 (1948).

A verdict should have been directed against the driver of an automobile, the windshield of which was covered with snow except for a small place which provided only vision straight ahead, who stopped before going onto a highway and then proceeded to run into a vehicle traveling the highway after the other driver had sounded his horn within 300 feet of the intersection upon seeing the stopped car. *Trewolla v. Garrett*, 200 Miss. 563, 27 So. 2d 887 (1946).

This statute [Code 1942, § 1454] had no application to sustain recovery against a railroad for the death of a truck driver resulting from the collision of his truck with an unlighted railroad car standing on the railroad crossing where the negligence of the driver was the sole proximate cause of his death. *Mississippi Export Ry. v. Summers*, 194 Miss. 179, 11 So. 2d 429 (1943), error overruled, 194 Miss. 193, 11 So. 2d 905 (1943).

Conduct of plaintiff's gin foreman in failing to extinguish grass fire adjacent to plaintiff's premises, which had been started on railroad premises and negligently left without complete extinguishment by railroad employees, constituted contributory negligence which would not bar recovery by the owner of the gin premises for destruction of the gin in view of this section [Code 1942, § 1454]. *Yazoo & Miss. V. Ry. v. Fields*, 188 Miss. 725, 195 So. 489 (1940), error overruled, 188 Miss. 734, 196 So. 503 (1940).

Under this section [Code 1942, § 1454] contributory negligence does not bar the right to recover if negligence chargeable

against the defendant also proximately contributed thereto. *T.A. Pittman, Inc., v. La Fontaine*, 68 F.2d 469 (5th Cir. 1934).

Notwithstanding the statute requiring auto drivers in approaching a crossing to stop, a driver or person who fails to observe this law is not precluded from recovering damages where negligence of the R. Co. is the proximate cause of the damage. *Gulf & S.I.R.R. v. Saucier*, 139 Miss. 497, 104 So. 180 (1925).

Negligence of the plaintiff in driving upon a railroad track which contributed to his injury will not bar his recovery where the negligence of the defendant railroad company was a proximate cause of the injury. *Davis v. Elzey*, 126 Miss. 789, 89 So. 666 (1921).

Contributory negligence is no bar where defendant contributed to the injury. *Tallahala Lumber Co. v. Holliman*, 125 Miss. 308, 87 So. 661 (1921).

Where injury to employee was due solely to an obvious hazard incident to the employment, employer was not liable and there could be no recovery. *Crossett Lumber Co. v. Land*, 121 Miss. 834, 84 So. 15 (1920).

However, where there is no negligence shown by the defendant and contributory negligence is the sole cause of the injury, there can be no recovery. *Ragland v. Native Lumber Co.*, 117 Miss. 602, 78 So. 542 (1918).

Fact that plaintiff was negligent in fighting a grass fire, set out wrongfully by the railroad company, does not exonerate the company from liability. *Illinois Cent. R.R. v. Thomas*, 109 Miss. 536, 68 So. 773 (1915).

Where the killing occurred within the corporate limits of a city and the proximate cause was the speed of train exceeding six miles per hour, the defendant is responsible for at least part of the damages. *Illinois Cent. R.R. v. Handy*, 108 Miss. 421, 66 So. 783 (1914).

6. Extent of recovery.

A jury has the duty and prerogative to make a decision as to contributory negligence and to reduce the award of damages, if any, in accordance with any contributory negligence. *City of Jackson v. Copeland*, 490 So. 2d 834 (Miss. 1986).

Plaintiff, who sustained permanent injuries in diving into extremely shallow water from a negligently maintained municipal pier, was guilty of contributory negligence in not first determining the depth of the water, and the jury should have diminished his damages in proportion of the amount that his negligence contributed to the total negligence. *Dendy v. City of Pascagoula*, 193 So. 2d 559 (Miss. 1967).

Where the negligent acts of two persons precipitate an emergency followed by an accident, and one of the parties is injured as a direct result of the prior acts of negligence of both, the other party is liable in damages to the injured party in proportion to his acts of negligence which contributed to the accident under the same rule as if the injury were caused by his negligence without an intervening emergency. *Peel v. Gulf Transp. Co.*, 252 Miss. 797, 174 So. 2d 377 (1965).

In an action against a city on behalf of an eight-year-old child injured when he fell into a drainage ditch, even if the plaintiff could have been guilty of contributory negligence, this was not a bar to recovery, but could be considered by the jury in determining the amount of damages, which presumably the jury did in arriving at the amount of the verdict. *Shows v. City of Hattiesburg*, 231 Miss. 648, 97 So. 2d 366 (1957).

Since under the defendant's own admission he was guilty of negligence in proceeding into a through street without continuing to look for the hazard of plaintiff's approaching automobile, plaintiff was entitled to a peremptory instruction, and even though plaintiff may have been guilty of contributory negligence there would be an issue for the jury and, after plaintiff had been found guilty of contributory negligence, it would only diminish the amount of damages to be awarded to him. *Wells v. Bennett*, 229 Miss. 135, 90 So. 2d 199 (1956).

In an action for injury sustained when a plaintiff's coal truck struck defendant's pick-up truck which was making a left turn in front of plaintiff's vehicle to enter an intersecting county road, even if plaintiff was contributorily negligent in driving at an excessive speed while visibility was

poor, and failing to blow his horn, and in failing to slow down as he approached the intersection, under this section [Code 1942, § 1454] he was not barred from recovery, although the amount of damages which he might otherwise have been entitled to recover would be diminished in proportion to the amount of negligence, if any, attributable to him. *Cobb v. Williams*, 228 Miss. 807, 90 So. 2d 17 (1956).

Plaintiff's negligence can be urged in mitigation of damages but not as bar to recovery, unless constituting sole, proximate cause. *McClellan v. Illinois Cent. R.R.*, 204 Miss. 432, 37 So. 2d 738 (1948).

Even though a mechanic's helper, who died as result of a can of gasoline used in priming an engine being thrown on him after the gasoline therein had become ignited when the engine backfired, was contributorily negligent in choosing the particular can and in standing in a dangerous position, the jury could properly reduce the damages, if it should find that the employer was liable in negligently failing to furnish a safe priming can. *Proctor & Gamble Defense Corp. v. Bean*, 146 F.2d 598 (5th Cir. 1945).

City's negligence in construction and maintenance of streets is to be determined from its own conduct, without regard to whether the injured person was using reasonable care, and its liability becomes fixed when such negligence becomes the proximate cause of the injury; the negligence of the injured person becomes a relevant factor under this section [Code 1942, § 1454] as to the extent of such liability. *City of Meridian v. King*, 194 Miss. 162, 11 So. 2d 205 (1943), error overruled, 194 Miss. 175, 11 So. 2d 830 (1943).

If negligence of motorist in failing to have his automobile equipped with rear red light contributes to rear end collision, motorist is liable under concurrent negligence statute for his proportion of damages sustained by motorist who ran into automobile. *Solomon v. Continental Baking Co.*, 172 Miss. 388, 160 So. 732 (1935).

In actions for personal injuries, or for death resulting therefrom, contributory negligence is not a bar to recovery, but the damages are diminished in proportion to the amount of negligence attributable to

the person injured or killed. *Louisville & N.R.R. v. Wickton*, 55 F.2d 642 (5th Cir. 1932).

Where a city maintains a zoo as a public park with wild and dangerous animals therein, it is responsible for damages caused by such animals, due to the negligence of its officers and agents, to persons visiting the park; but damages for the injury should be reduced on account of contributory negligence of the party injured. *Byrnes v. City of Jackson*, 140 Miss. 656, 105 So. 861, 42 A.L.R. 254 (1925).

Contributory negligence of a servant who is injured goes to diminish his damages. *Hardy v. Turner-Farber-Love Co.*, 136 Miss. 355, 101 So. 489 (1924).

Contributory negligence is no longer a defense for personal injuries, but goes only to the amount of damages. *Mississippi Cent. R.R. v. Lott*, 118 Miss. 816, 80 So. 277 (1918), cert. denied, 249 U.S. 616, 39 S. Ct. 391, 63 L. Ed. 803 (1919); *Gulf & S.I.R.R. v. Boone*, 120 Miss. 632, 82 So. 335 (1919), cert. denied, 251 U.S. 561, 40 S. Ct. 220, 64 L. Ed. 415 (1920), error dismissed, 252 U.S. 567, 40 S. Ct. 343, 67 L. Ed. 719 (1920).

Under this statute [Code 1942, § 1454] contributory negligence does not bar a recovery but will cause a reduction of damages for the injury. *Cumberland Tel. & Tel. Co. v. Cosnahan*, 105 Miss. 615, 62 So. 824 (1913); *Tombigbee Mill & Lumber Co. v. Hollingsworth*, 162 F.2d 763 (5th Cir. 1947), cert. denied, 332 U.S. 824, 68 S. Ct. 165, 92 L. Ed. 399 (1947).

7. Evidence.

The jury may not reduce plaintiff's damages where the evidence fails to prove contributory negligence. *Herrington v. Hodges*, 249 Miss. 131, 161 So. 2d 194 (1964).

Evidence warranted jury in automobile collision case in finding negligence and contributory negligence. *Hawkins v. Hillman*, 245 Miss. 385, 149 So. 2d 17 (1963).

In an action for injuries sustained by plaintiff who was struck by an automobile while standing on the shoulder of a highway waiting for a ride, a finding that the plaintiff had stepped into the highway in front of an automobile was not supported by evidence and therefore did not warrant

the jury in employing the comparative negligence doctrine, and a new trial would be granted on the issue of damages alone when all the facts should be presented to the jury on the question of negligence and the jury will have the right to apportion the damages under the comparative negligence statute. *Vaughan v. Bollis*, 221 Miss. 589, 73 So. 2d 160 (1954).

Evidence that excessive speed of train directly and proximately contributed to pedestrian's death, in that pedestrian was unable to get out of the way, supported verdict allowing recovery, notwithstanding evidence of pedestrian's contributory negligence. *Gulf & S.I.R.R. v. Bond*, 181 Miss. 254, 179 So. 355 (1938), modified, 181 Miss. 277, 181 So. 741 (1938), overruled in part, *Illinois Cent. R.R. v. Nelson*, 245 Miss. 395, 146 So. 2d 69 (1962), overruled in part, *Illinois Cent. R.R.* 254 Miss. 411, 148 So. 2d 712 (1963).

In trial of damage issue after judgment was reversed as to amount of damages and was remanded for trial on that issue only, evidence as to negligence of defendant and contributory negligence of plaintiff held admissible, since such negligence entered into fixation of damages under statute. *Mississippi Cent. R.R. v. Smith*, 176 Miss. 306, 168 So. 604 (1936), appeal dismissed, cert. denied, 299 U.S. 518, 57 S. Ct. 313, 81 L. Ed. 382 (1936).

8. Questions for jury.

Extent to which negligence defendant may escape liability by arguing that condition causing damage to plaintiff was open and obvious is question for jury. *Bell v. City of Bay St. Louis*, 467 So. 2d 657 (Miss. 1985).

In accordance with the provisions of this section [Code 1942, § 1454], contributory negligence on the part of a pedestrian struck and killed by an automobile is not a bar to a recovery if there is negligence proved on the part of the defendant motorist, but all questions of contributory negligence or comparative negligence should be submitted to the jury for the jury's determination where there is such a question. *Hogan v. Cunningham*, 252 Miss. 216, 172 So. 2d 408 (1965).

The right under this section [Code 1942, § 1454] to apportion damages is for the jury, in the light of the circumstances and

reasonable bounds. *Southeastern Constr. Co. v. Dodson's Dependent*, 247 Miss. 1, 153 So. 2d 276 (1963).

In bowler's action to recover for damages for injuries sustained in fall allegedly due to the negligence of the bowling establishment proprietor, questions as to assumption of risks and contributory negligence should have gone to jury under proper instructions. *Elias v. New Laurel Radio Station, Inc.*, 245 Miss. 170, 146 So. 2d 558, 92 A.L.R.2d 1065 (1962).

Where a judgment in an action arising out of an intersectional motor vehicle collision was reversed and remanded for retrial on the question of the amount of damages alone, upon the retrial all the facts should be presented to the jury on the question of the negligence of all parties, and a jury would have the right to apportion damages under the comparative negligence statute. *Carlisle v. Cobb Bros. Constr. Co.*, 238 Miss. 681, 119 So. 2d 918 (1960).

On retrial of personal injury action on issue of damages only, the evidence should not be limited to the question of damages, but all of the facts should be presented for the jury's consideration as to the negligence of all parties, and the jury could apportion damages under the comparative negligence statute. *Jenkins v. Cogan*, 238 Miss. 543, 119 So. 2d 363 (1960).

Although motorist's failure to stop before attempting to cross railroad tracks was negligence contributing to the collision with a railroad switch engine, trial court properly refused railroad's requested peremptory instruction where the evidence presented questions for the jury as to whether the proximate cause of the collision was failure of the railroad to ring the bell on its engine, or the negligence of the railroad's engineer in failing to stop the engine when the engineer saw that motorist's automobile was not going to stop. *New Orleans & N.E.R. Co. v. Ready*, 238 Miss. 199, 118 So. 2d 185 (1960).

In an action against a railroad and its engineer for damages to a tractor trailer caused by a crossing collision, where the evidence established that the railroad and its engineer was liable as a matter of law, but also raised jury questions as to the contributory negligence, if any, of the

truck driver, whether under the comparative negligence statute plaintiff's damages sustained should have been diminished, whether the negligence of the engineer was the sole, proximate cause of the collision, and the applicability of the last clear chance doctrine, the case was reversed and remanded for submission to a jury on issues of damages alone. *New Orleans & N.E.R. Co. v. Dixie Hwy. Express, Inc.*, 230 Miss. 92, 92 So. 2d 455 (1957).

In a death action arising out of a collision between decedent's truck and defendant's train at a railroad crossing, the conflicting testimony as to the speed of the train and as to the giving of statutory signals, when considered in connection with the alleged obstruction of decedent's view by a packing shed, depot building, and two box cars along the west side of the packing shed, all tending to show that the decedent could not have seen the train by exercising reasonable care until he was in the act of crossing the track, presented an issue for the jury. *Illinois Cent. R.R. v. Sanders*, 229 Miss. 139, 90 So. 2d 366 (1956), overruled on other grounds, *Sheffield v. Sheffield*, 405 So. 2d 1314 (Miss. 1981).

It is for the jury to decide whether it will diminish the damages in proportion to the amount of negligence attributable to the plaintiff when under all the testimony and circumstances thereby shown a part of the negligence contributing to plaintiff's injuries was attributable to his own negligence, even if no instruction to this effect is requested by either party. *Mutual Life Ins. Co. v. Rather*, 221 Miss. 527, 73 So. 2d 163 (1954).

In an action by a bicyclist against a cab company for injuries suffered when he jumped off the bicycle to avoid being crushed by the cab against a van type truck ahead, the question of excessive speed of the cab and the proximate cause of the negligence was for the jury. *Coker v. Five-Two Taxi Serv.*, 211 Miss. 820, 52 So. 2d 356 (1951), error overruled, 211 Miss. 826, 52 So. 2d 835 (1951).

Where the place of work was not obviously safe, it was for the jury to determine whether the method was safe which an employee chose in the performance of an assigned task. *Tombigbee Mill & Lumber*

Co. v. Hollingsworth, 162 F.2d 763 (5th Cir. 1947), cert. denied, 332 U.S. 824, 68 S. Ct. 165, 92 L. Ed. 399 (1947).

In an action against an electric power company for the death of one of its linemen, electrocuted when he came in contact with a high powered wire while engaged in work on a pole, whether the company was negligent or the lineman was negligent in failing to cut off the power, or insulate the wire with a rubber blanket, proximately causing the injury, was for the jury to determine. *Mississippi Power & Light Co. v. Merritt*, 194 Miss. 794, 12 So. 2d 527 (1943).

In an action by an employee against his employer for injuries sustained by reason of an explosion resulting from the use of gasoline, mistakenly thought to be kerosene, in starting a fire for the purpose of heating grease guns and warming the employees in connection with construction of a highway, questions with respect to the employer's duty to furnish a reasonably safe place for its employees to work, reasonably safe instrumentalities to work with, and a reasonably safe method and rules under which to work, were for the jury, the comparative negligence statute answering to some extent the employer's argument that it was entitled to a directed verdict. *Curry & Turner Constr. Co. v. Bryan*, 184 Miss. 44, 185 So. 256 (1939).

In an action against a railroad for injuries sustained in a railroad crossing collision by an automobile owner while riding as a passenger in his automobile driven by another with his permission and in his interests, questions of the negligence of the railroad in failing to give statutory signals at crossings and the negligence of the driver of the automobile, imputable to the owner, were for the jury, since under this section [Code 1942, § 1454] it is the duty of the jury to compare and allocate the negligence of the parties under instruction of the court. *Flynn v. Kurn*, 183 Miss. 413, 184 So. 160 (1938).

Statute imposing duty of diminishing damages because of contributory negligence should be observed by juries. *Gulf & S.I.R.R. v. Bond*, 181 Miss. 254, 179 So. 355 (1938), modified, 181 Miss. 277, 181 So. 741 (1938), overruled in part, *Illinois Cent. R.R. v. Nelson*, 245 Miss. 395, 146

So. 2d 69 (1962), overruled in part, Illinois Cent. R.R. 254 Miss. 411, 148 So. 2d 712 (1963).

Whether motorist whose automobile struck a gondolo car, spotted by railroad employees so that it extended partly across public highway, was contributorily negligent held for jury. *Magers v. Okolona, H. & C.C. R.R.*, 174 Miss. 860, 165 So. 416 (1936).

Liability of railroad for death of motorist in crossing collision and question of damages in view of deceased's contributory negligence were for the jury. *Louisville & N.R.R. v. Wickton*, 55 F.2d 642 (5th Cir. 1932).

Negligence of town in respect to injury to pedestrian stumbling on stake on sidewalk held for jury. *Gould v. Town of Newton*, 157 Miss. 111, 126 So. 826 (1930).

9. Instructions.

When a comparative negligence instruction is given, the jury should be instructed as to an alternative format for the rendering of a comparative negligence verdict which provides for an apportionment of fault or damages if both parties are found to be negligent. *Burton ex rel. Bradford v. Barnett*, 615 So. 2d 580 (Miss. 1993).

When there is evidence to support a comparative negligence instruction, it is not error to give the instruction even though each party may contend that the other was entirely at fault. *Pham v. Welter*, 542 So. 2d 884 (Miss. 1989).

Instruction that would allow jury to find that plaintiff was independent intervening cause of accident, and therefore sole proximate cause, of accident merely because she was involved in accident, no matter how negligent defendant might have been, was error. *Blackmon v. Payne*, 510 So. 2d 483 (Miss. 1987).

The giving of instruction on contributory negligence without stating the facts necessary to constitute contributory negligence is, unless cured by other instructions given, reversible error. *City of Jackson v. Copeland*, 490 So. 2d 834 (Miss. 1986).

A jury instruction in an automobile collision case for the defendant to the effect that if the jury finds, after considering all of the evidence, that the evidence is evenly balanced for the defendant and for a

plaintiff, they must find for the defendant, was erroneously granted. *First Nat'l Bank v. Mississippi State Hwy. Comm'n*, 227 So. 2d 118 (Miss. 1969).

An instruction is erroneous which would cut off any recovery by the plaintiff as a result of contributory negligence on his part. *Bozeman v. Tucker*, 203 So. 2d 795 (Miss. 1967).

Instructions which fail to allow the jury the right to apply the comparative negligence statute are defective and erroneous. *Bozeman v. Tucker*, 203 So. 2d 795 (Miss. 1967).

In action brought by house mover against electric company for injuries he received from coming into contact with live power line, an instruction for defendant that if jury believed plaintiff knew and appreciated dangers existing in connection with overhead power line and voluntarily placed himself in a position to come in contact with it he had assumed the risks incident thereto, including any negligence of defendant, defendant would not be liable for plaintiff's injuries, was erroneously granted; for it prevented application of comparative negligence doctrine by jury and eliminated distinction between assumption of risk and contributory negligence, where there was evidence in record to the effect that an employee of defendant told plaintiff the wire was harmless and plaintiff should take hold of it and lift it up. *Crouch v. Mississippi Power & Light Co.*, 193 So. 2d 144 (Miss. 1966).

To instruct the jury for the plaintiff in an automobile collision action that the jury could not find him guilty of contributory negligence because of the comparative negligence statute was error. *Whitten v. Land*, 188 So. 2d 246 (Miss. 1966).

An instruction for the defendant in a wrongful death action that if the jury believes from the evidence that the injury and subsequent death of the plaintiff was proximately caused by the negligence, if any, of the plaintiff, then the jury should return a verdict for the defendant, is an erroneous instruction and in conflict with the provisions of this section [Code 1942, § 1454]. *Hogan v. Cunningham*, 252 Miss. 216, 172 So. 2d 408 (1965).

Although the defendant in a wrongful death action did not ask for or receive an

instruction on contributory negligence, the jury had the right to apply the comparative negligence statute without an instruction to that effect. *Winstead v. Hall*, 251 Miss. 800, 171 So. 2d 354 (1965).

Where facts constituting contributory negligence are pleaded and proved, a request to instruct on contributory negligence is not essential to enable the jury to consider it in assessing damages. *Herrington v. Hodges*, 249 Miss. 131, 161 So. 2d 194 (1964).

To instruct jury that contributory negligence will defeat recovery is erroneous under this provision. *Arnold Servs., Inc. v. Delta Motor Lines*, 325 F.2d 860 (5th Cir. 1963).

Instruction in action for alleged negligent installation of machine that jury should find for defendant if they found that the machine was not being handled properly by plaintiff, held erroneous. *Pevey v. Alexander Pool Co.*, 244 Miss. 25, 139 So. 2d 847 (1962).

In an automobile collision case, where the testimony as to the negligence of the respective parties, the drivers of the vehicles, was sharply conflicting, the court was warranted in giving an instruction on contributory negligence. *Ferguson v. Denton*, 239 Miss. 591, 124 So. 2d 279 (1960).

The trial court was warranted in giving to the defendants a comparative negligence instruction in an action arising out of an intersectional motor vehicle collision. *Carlisle v. Cobb Bros. Constr. Co.*, 238 Miss. 681, 119 So. 2d 918 (1960).

An instruction in an action by one who slipped on a wet floor in a store entrance that plaintiff assumed such risks as were obvious to a person of ordinary intelligence, and that if plaintiff saw, knew and appreciated the danger, or should have done so by the exercise of reasonable care, the finding should be for the defendant is erroneous as eliminating the distinction between assumption of risk and contributory negligence and as denying the jury's right to weigh the respective negligence, if any, of the parties. *Wallace v. J.C. Penney Co.*, 236 Miss. 367, 109 So. 2d 876 (1959).

In an action against an automobile driver for injuries sustained by a bicyclist, instructions to the jury that the plaintiff

could not recover if he did not keep his bicycle under control, failed to keep a proper lookout for others on the highway and did not use due care to avoid placing himself in a place of danger so as to create emergency, failed to take into account the provisions of comparative negligence statutes which provide that the plaintiff's contributory negligence shall not bar a recovery, if the proof showed that the defendant was negligent and that the defendant's negligence was the proximate contributing cause to the plaintiff's injuries. *Rivers v. Turner*, 223 Miss. 673, 78 So. 2d 903 (1955).

In an action for damages for personal injury alleged to have been sustained as the result of stepping into a hole or depression in a public walkway in which the defendant had laid its gas main, refusal of plaintiff's instruction that contributory negligence of the plaintiff shall not bar recovery was error, even though the instruction did not contain a direction for diminishing damages in accordance with this section [Code 1942, § 1454]. *Mason v. United Gas Corp.*, 222 Miss. 311, 75 So. 2d 736 (1954).

In an action for damages sustained in an automobile collision an instruction to the jury to the effect that recovery could not be had if both parties were equally negligent and their negligence contributed equally to the proximate cause of the collision, was in violation of this section [Code 1942, § 1454]. *Carruth v. Griffis*, 220 Miss. 541, 71 So. 2d 478 (1954).

If the defendant in a negligence suit had desired to avail himself of the statutory right to have the damages diminished in proportion to negligence, if any, of the plaintiff, it was his duty to request the court to so instruct the jury. *Mason v. United Gas Corp.*, 222 Miss. 311, 75 So. 2d 736 (1954); *Alabama & V. Ry. Co. v. McGee*, 117 Miss. 370, 78 So. 296 (1918); *Ouille v. Saliba*, 246 Miss. 365, 149 So. 2d 468 (1963).

An instruction to the jury as to age, intelligence, knowledge, experience and discretion of a child should be confined to the time of accident, not to the time of the trial. *Johnson v. Howell*, 213 Miss. 195, 56 So. 2d 491 (1952).

An instruction to the jury that the plaintiff must prove the charge of negli-

gence by a preponderance of credible evidence and that the jury find the evidence touching the charge of negligence against the defendant to be evenly balanced, after fairly considering it, it was their duty to return a verdict for the defendant, was conceptually correct where it was limited by another instruction which limited the above to element of negligence. *Evans v. Jackson City Lines*, 212 Miss. 895, 56 So. 2d 80 (1952).

Instructions which are fundamentally in violation of this statute [Code 1942, § 1454] by absolving defendant from liability for negligence if plaintiff is also negligent are substantially erroneous and will not be cured by other instructions in record. *Wilburn v. Gordon*, 209 Miss. 27, 45 So. 2d 844 (1950).

Instruction that if jury believed from evidence that plaintiff and defendant were equally negligent, jury should find for defendant, is erroneous, for if both were negligent equally, defendant would not be absolved from liability altogether, but plaintiff's damages would be reduced by fifty per cent. *Wilburn v. Gordon*, 209 Miss. 27, 45 So. 2d 844 (1950).

In action for damages to automobile arising out of ramming by truck, instruction that even if jury believed from preponderance of evidence that defendant was guilty of negligence, if jury also believed that plaintiff was negligent, jury should find for defendant or diminish plaintiff's actual damages in such proportion as plaintiff's negligence may have contributed to accident is erroneous and should not have been given. *Wilburn v. Gordon*, 209 Miss. 27, 45 So. 2d 844 (1950).

In employee's suit against employer for personal injuries where evidence disclosed that injury resulted from negligence of fellow servants brought about by the direct order of the foreman, instruction eliminating entirely the question of whether or not the negligent order of the foreman was either the proximate cause or a contributing cause to the accident and injury, and tending to mislead the jury to apply the doctrine of assumption of risk, and to use contributory negligence as a complete bar to the action, was error. *Oakes v. Mohon*, 208 Miss. 478, 44 So. 2d 551 (1950).

Speed of train when plaintiff, who had boarded train to assist passenger with luggage, alighted, has bearing in action for injuries sustained in getting off train only on question of whether railroad company is entitled to have jury instructed, as a matter of law, that plaintiff was guilty of negligence mitigating damages. *McClellan v. Illinois Cent. R.R.*, 204 Miss. 432, 37 So. 2d 738 (1948).

In action for injuries resulting from automobile collision at intersection of cross road with through traffic lane, failure to give a comparative negligence instruction on behalf of plaintiff is not erroneous when instruction was not requested and plaintiff predicated liability on finding that defendant was negligent and defendant's negligence was the sole, proximate cause of plaintiff's injuries. *Davidian v. Wendell*, 37 So. 2d 570 (Miss. 1948), error overruled, 37 So. 2d 771 (Miss. 1948).

In action for death of child caused by negligent act of defendant, an instruction authorizing jury to take into consideration "any negligence on the part of the deceased child" is properly refused as the instruction fails to set forth elements of such negligence, if any, and its proximate contribution to injuries. *Stevenson v. Robinson*, 37 So. 2d 568 (Miss. 1948).

Under Mississippi law a defendant may not have the advantage of this section [Code 1942, § 1454] unless he pleads contributory negligence and requests an instruction on comparative negligence and diminution of damages. *Railway Exp. Agency v. Mallory*, 168 F.2d 426 (5th Cir. 1948), cert. denied, 335 U.S. 824, 69 S. Ct. 48, 93 L. Ed. 378 (1948).

The trial court could not voluntarily instruct the jury to apportion damages where the defendant did not request that the jury consider his rights in the matter of comparative negligence. *Robinson v. Colotta*, 199 Miss. 800, 26 So. 2d 66 (1946).

Where contributory negligence on the part of plaintiff which contributed to the accident is shown, and the defendant has properly invoked the comparative negligence statute, it is reversible error for the trial court to instruct the jury, in effect, that they may disregard the statute.

Moore v. Abdalla, 197 Miss. 125, 19 So. 2d 502 (1944).

Instructions for defendant in personal injury action that if the jury should find that both plaintiff and defendant were guilty of negligence, proximately causing the accident or proximately contributing to the cause of such accident, and the jury should return any verdict for the plaintiff, then under their oath the jury must lessen any damages, if any, awarded to the plaintiff to the amount of negligence attributable to the plaintiff, was not reversible error, although the court might better have followed the unambiguous language of this section [Code 1942, § 1454]. Clary v. Breyer, 194 Miss. 612, 13 So. 2d 633 (1943).

In action against truck owner for death of truck driver caused by flat tire on truck, instruction that driver's contributory negligence in driving truck after one tire had been repaired after blowout would not bar recovery, held not erroneous. Crosby Lumber & Mfg. Co. v. Durham, 181 Miss. 559, 179 So. 285 (1938), error overruled, 181 Miss. 573, 179 So. 854 (1938).

Plaintiff's instructions authorizing recovery despite contributory negligence and assessment of full damages in event of finding for plaintiff held violative of statutory requirement for proportionate diminution of damages. Graves v. Johnson, 179 Miss. 465, 176 So. 256 (1937).

In view of this section [Code 1942, § 1454], automobile owner held not entitled to more than instruction directing jury to consider passenger's contributory negligence. Watson v. Holiman, 169 Miss. 585, 153 So. 669 (1934).

Instruction permitting jury to consider plaintiff's contributory negligence, if any, in diminution of damages, where not pleaded, if error, held harmless where jury found plaintiff's negligence was sole proximate cause of injury. White v. Weitz, 169 Miss. 102, 152 So. 484 (1934).

That each motorist claimed collision was caused by the other's negligence did not render instruction based on comparative negligence statute erroneous. Morrell Packing Co. v. Branning, 155 Miss. 376, 124 So. 356 (1929).

This statute [Code 1942, § 1454] makes it proper to instruct the jury that they

should apportion the damages. Hudson v. Louisville & N.R.R., 30 F.2d 391 (5th Cir. 1929).

Instruction based on comparative negligence statute held not erroneous because not instructing jury to diminish damages in proportion to negligence of plaintiff. Morrell Packing Co. v. Branning, 155 Miss. 376, 124 So. 356 (1929); White v. Chicago S. Transp. Co., 226 Miss. 294, 84 So. 2d 161 (1955).

Instruction that contributory negligence of person in collision between automobile and train would not bar recovery held not erroneous, when considered with instructions as a whole. Gulf & S.I.R.R. v. Simmons, 150 Miss. 506, 117 So. 345 (1928).

By reason of this provision, Hemingway's Code 1917, § 502, it is proper to refuse a charge that a defendant is not liable if the plaintiff is guilty of contributory negligence. Reynolds-West Lumber Co. v. Kellum, 19 F.2d 72 (5th Cir. 1927).

Unless the speeding of the automobile was the sole cause of the injury complained of, an instruction that if the speed exceeded ten miles per hour approaching defective bridge the plaintiff could not be allowed to recover, is erroneous. Dent v. Town of Mendenhall, 139 Miss. 271, 104 So. 82 (1925).

An instance of erroneous instruction as to diminution of damages. Waterford Lumber Co. v. Jacobs, 132 Miss. 638, 97 So. 187 (1923).

An instance of an erroneous instruction with reference to comparative negligence contributing to the injury. Yazoo & Miss. V. Ry. v. Mullins, 125 Miss. 242, 87 So. 490 (1921).

A jury may be instructed that mere contributory negligence does not bar a recovery of damages for death. Illinois Cent. R.R. v. Archer, 113 Miss. 158, 74 So. 135 (1917).

A party to the suit desiring that the jury be instructed as to the effect of contributory negligence must ask such instruction. Lindsey Wagon Co. v. Nix, 108 Miss. 814, 67 So. 459 (1915).

10. —Peremptory instruction.

The trial court properly denied a peremptory instruction to defendant power company in an action by plaintiff injured

when his television antenna, which he was negligently handling, came in contact with a high voltage line, where there was a question of fact as to whether defendant should have isolated, insulated, or guarded its lines and as to whether it should have issued a warning. *Evans v. State Farm Fire & Cas. Co.*, 336 So. 2d 753 (Miss. 1976).

A peremptory instruction should have been granted in an action against an employer by an employee who was injured when a steel rim sprung out and struck him as he was changing a truck tire, the evidence showing that he was familiar with the proper method and that the employer had a right to so assume. *Masonite Corp. v. Stevens*, 201 Miss. 876, 30 So. 2d 77 (1947).

Even if a fire, started by railroad employees to burn the grass on railroad property and left without complete extinguishment, had already reached the plaintiff's premises when plaintiff's foreman put out some of the fire but not all of it, plaintiff would still be entitled to at least nominal damages for destruction of the gin on her premises, which in itself was sufficient to avoid a peremptory instruction requested by the railroad in an action against it for damages. *Yazoo & Miss. V. Ry. v. Fields*, 188 Miss. 725, 195 So. 489 (1940), error overruled, 188 Miss. 734, 196 So. 503 (1940).

Under this statute [Code 1942, § 1454] contributory negligence does not bar a recovery, and therefore it is not error to deny a peremptory instruction for the defendant. *Perez v. Fayard*, 64 F.2d 667 (5th Cir. 1933).

An instance where peremptory instruction should have been given for the admitted or proven negligence of defendant causing injury. *Illinois Cent. R.R. v. Archer*, 113 Miss. 158, 74 So. 135 (1917).

11. Damages.

In an action brought by a city against an architect-engineer and contractors for damages resulting from the failure of a protective levy surrounding the construction site of a waste water treatment plant in which both defendants counterclaimed and crossclaimed, the record supported an apportionment of liability in favor of the city for installation of a second slurry wall

to be 50 percent against the architect-engineer and 50 percent against the contractor pursuant to Miss Code § 11-7-15. Moreover, the architect-engineer was required to bear the sole responsibility to the city for damages resulting from the levy failures as well as repairs to the access bridge. *Mayor & City Council v. Clark-Dietz & Assocs.-Eng'rs*, 550 F. Supp. 610 (N.D. Miss. 1982), appeal denied, 702 F.2d 67 (5th Cir. 1983).

Under the Mississippi comparative negligence statute, the negligence of a father who took his 5-year-old son across a highway so that the son might buy milk and failed to take steps so that the son might return safely, when possible negligence on the part of drivers on the highway was or should have been foreseeable by the father, was twice as great as the negligence of a truckdriver who failed to see the child recrossing the highway, so that the whole damages sustained by the father must be reduced by two thirds, limiting the recovery against the defendant employer of the truckdriver to one third of the sum. *Wright v. Standard Oil Co.*, 319 F. Supp. 1364 (N.D. Miss. 1970), rev'd on other grounds, 470 F.2d 1280 (5th Cir. 1972), reh'g denied, 471 F.2d 650 (5th Cir. 1973).

Where on a new trial, granted because of an erroneous instruction on contributory negligence, damages alone should be submitted to the jury, but the defendant may assert, in diminution of damages, any negligence on the part of plaintiff's decedent which can be shown to have contributed to the injuries sustained by the decedent. *Glover v. Daniels*, 310 F. Supp. 750 (N.D. Miss. 1970).

Damages for personal injury will not be held grossly inadequate where jury, in determining amount, may have found contributory negligence. *Ramsey v. Price*, 249 Miss. 192, 161 So. 2d 778 (1964).

Where a judgment in an action arising out of an intersectional motor vehicle collision was reversed and remanded for retrial on the question of the amount of damages alone, upon the retrial all the facts should be presented to the jury on the question of the negligence of all parties, and a jury would have the right to apportion damages under the comparative negligence statute. *Carlisle v. Cobb*

Bros. Constr. Co., 238 Miss. 681, 119 So. 2d 918 (1960).

On retrial of personal injury action on issue of damages alone, the evidence should not be limited to question of damages, but all the facts bearing upon the issue of negligence of all parties should be presented, and the jury could apportion damages under the comparative negligence statute. *Jenkins v. Cogan*, 238 Miss. 543, 119 So. 2d 363 (1960).

In rendering a verdict for cross-complainant, the respective amounts found for complainant and cross-complainant need not be indicated. *Johnson v. Richardson*, 234 Miss. 849, 108 So. 2d 194 (1959).

In a proceeding on libel for collision, damages would be apportioned equally in a case where both parties had been at fault to the extent of twenty per cent and eighty per cent. *Adams v. Construction Aggregates Corp.*, 125 F. Supp. 110 (D.N.Y. 1954), *aff'd*, 237 F.2d 884 (2d Cir. N.Y. 1956), *cert. denied*, 352 U.S. 971, 77 S. Ct. 364, 1 L. Ed. 2d 325 (1957).

Although no instruction was given concerning comparative negligence statutes, a jury was authorized to apply the statutes in determining award for injuries sustained in automobile collision. *Gilliam v. Sykes*, 216 Miss. 54, 61 So. 2d 672 (1952).

Where neither the plaintiff nor the defendant in an automobile collision case requested instructions based upon the comparative negligence statute, the jury was not required to apportion and compare the damages on account of the negligence of the parties; the court could not voluntarily instruct the jury on the subject; and the reviewing court could not consider the comparative negligence of the parties in determining whether the verdict was excessive. *Avent v. Tucker*, 188 Miss. 207, 194 So. 596 (1940).

Contributory negligence of one of statutory beneficiaries held not imputed to other beneficiaries, so as to reduce damages recoverable from tort-feasor for death. *Nosser v. Nosser*, 161 Miss. 636, 137 So. 491 (1931).

Minor under 14 years employed in violation of law is not chargeable with contributory negligence requiring reduction of damages. *Hartwell Handle Co. v. Jack*, 149 Miss. 465, 115 So. 586 (1928).

A jury must diminish damages in proportion to contributory negligence of the injured person, but a motion for a new trial in the court below is necessary to a review of the adequacy of damages in the supreme court. *Tendall v. Davis*, 129 Miss. 30, 91 So. 701 (1922).

Plaintiff guilty of gross negligence, contributing to the injury, in crossing a railroad track at a private crossing is entitled to recover damages. *Yazoo & Miss. V. Ry. v. Williams*, 114 Miss. 236, 74 So. 835 (1917); *Mobile & O.R. Co. v. Campbell*, 114 Miss. 803, 75 So. 554 (1917).

12. —Amount of damages.

Award of only \$500 in actual damages to a motorcyclist who suffered severe injuries in a collision with automobile driven by unlicensed defendant was not erroneous, under showing that motorcyclist's negligence contributed to the accident. *Employers Mut. Cas. Co. v. Tompkins*, 490 So. 2d 897 (Miss. 1986).

Plaintiff is entitled to 50 percent of the damages arising from a pedestrian's death where the pedestrian and the truckdriver who struck him were equally negligent in that the truckdriver failed to reduce the speed of his truck to avoid striking the decedent when the decedent came within range of the truck's headlamps and the decedent, who was at a point in the roadway where there was not a marked crosswalk or an intersection, failed to perform his duty to yield the right-of-way to the truck. *Hornburger v. Baird*, 508 F. Supp. 84 (N.D. Miss. 1980).

An award of \$3000 damages to one who had sustained permanent and painful injuries in an automobile collision, and who in consequence had expended \$3564, held grossly disproportionate to any contributory negligence imputable to plaintiff, and to justify the conclusion that it was either the result of passion or prejudice, or of a failure properly to evaluate plaintiff's damages. *Swartzfager v. Southern Bell Tel. & Tel. Co.*, 236 Miss. 322, 110 So. 2d 380 (1959).

Twenty thousand dollars for the death of a lineman, resulting from his electrocution while working on a pole containing a high voltage wire, was not excessive since the jury was not required to apportion and compare the damages on account of the

negligence of the parties, where the case was tried on the theory that either the power company's alleged negligence was the sole proximate cause of the injury or the negligence of the deceased lineman was the sole proximate cause of his injury. *Mississippi Power & Light Co. v. Merritt*, 194 Miss. 794, 12 So. 2d 527 (1943).

Award of one-sixth of the actual damages in a personal injury action did not represent a proper adjustment of responsibility under this section [Code 1942, § 1454] where there was no evidence that the plaintiff was negligent in any way; such verdict evinced passion and prejudice and should not be allowed to stand. *Dixon v. Breland*, 192 Miss. 335, 6 So. 2d 122 (1942).

In view of fact that plaintiff and others were pushing his stalled automobile off the highway when defendant, whose headlights had a range of 500 to 600 feet, crashed into the rear of plaintiff's automobile, demolishing it and severely injuring plaintiff, an award of \$100 damages was

so inadequate as to evince prejudice justifying reversal. *Lee v. Reynolds*, 190 Miss. 692, 1 So. 2d 487 (1941).

Ten thousand dollars to widow and two children, aged 1 and 3 years, for death of 24-year-old husband and father, earning \$12 per week, held excessive by \$2,500, decedent's negligence having been greater than negligence of railroad. *Gulf & S.I.R.R. v. Bond*, 181 Miss. 254, 179 So. 355 (1938), modified, 181 Miss. 277, 181 So. 741 (1938), overruled in part, *Illinois Cent. R.R. v. Nelson*, 245 Miss. 395, 146 So. 2d 69 (1962), overruled in part, *Illinois Cent. R.R. v. Nelson*, 254 Miss. 411, 148 So. 2d 712 (1963).

Four hundred dollars for fractured skull and hip not inadequate under evidence authorizing damages proportionate to negligence of injured person. *Pounders v. Day*, 151 Miss. 436, 118 So. 298 (1928).

An instance of the award of excessive damages. *Yazoo & Miss. V. Ry. v. Williams*, 114 Miss. 236, 74 So. 835 (1917).

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ALR. Contributory negligence as defense to action by state, United States, municipality, or other governmental unit. 1 A.L.R.2d 827.

Contributory negligence of one or more of the beneficiaries in an action for death as affecting the right of other beneficiaries who were not negligent. 2 A.L.R.2d 785.

Contributory negligence of parent as bar to an action by parent or administrator for death of child. 2 A.L.R.2d 785.

Contributory negligence of beneficiary as affecting action under death or survival statute. 2 A.L.R.2d 785.

Contributory negligence as a defense to a cause of action based upon violation of statute. 10 A.L.R.2d 853.

Contributory negligence of driver of motor vehicle as imputable to owner under statute making owner responsible for negligence of driver. 11 A.L.R.2d 1437.

Changes in cost of living or in purchasing power of money as affecting damages for personal injuries or death. 12 A.L.R.2d 611.

Application of last clear chance doctrine

in comparative negligence case. 59 A.L.R.2d 1261.

Modern trends as to contributory negligence of children. 77 A.L.R.2d 917.

Comment Note—The doctrine of comparative negligence and its relation to the doctrine of contributory negligence. 32 A.L.R.3d 463.

Retrospective application of state statute substituting rule of comparative negligence for that of contributory negligence. 37 A.L.R.3d 1438.

Construction of "good Samaritan" statute excusing from civil liability one rendering care in emergency. 39 A.L.R.3d 222.

Modern development of comparative negligence doctrine having applicability to negligence actions generally. 78 A.L.R.3d 339.

Judicial adoption of comparative negligence doctrine as applicable retrospectively. 78 A.L.R.3d 421.

Choice of law as to application of comparative negligence doctrine. 86 A.L.R.3d 1206.

Automobile occupant's failure to use seat belt as contributory negligence. 92 A.L.R.3d 9.

Nonuse of automobile seatbelts as evidence of comparative negligence. 95 A.L.R.3d 239.

Applicability of comparative negligence doctrine to actions based on strict liability in tort. 9 A.L.R.4th 633.

Effect of adoption of comparative negligence rules on assumption of risk. 16 A.L.R.4th 700.

Liability of theater owner or operator for injury to or death of patron resulting from lighting conditions on premises. 19 A.L.R.4th 1110.

Contributory negligence and assumption of risk in action against owner of store, office, or similar place of business by invitee falling on tracked-in water or snow. 20 A.L.R.4th 517.

Negligence of one parent contributing to injury or death of child as barring or reducing damages recoverable by other parent for losses suffered by other parent as result of injury or death of child. 26 A.L.R.4th 396.

Effect of plaintiff's comparative negligence in reducing punitive damages recoverable. 27 A.L.R.4th 318.

Exterminator's tort liability for personal injury or death directly resulting from operations. 29 A.L.R.4th 987.

Modern trends as to contributory negligence of children. 32 A.L.R.4th 56.

Personal liability of public school teacher in negligence action for personal injury or death of student. 34 A.L.R.4th 228.

Liability of wharf owner or operator for personal injuries to invitees or licensees resulting from condition of premises or operation of equipment. 34 A.L.R.4th 572.

Personal liability of public school executive or administrative officer in negligence action for personal injury or death of student. 35 A.L.R.4th 272.

Personal liability in negligence action of public school employee, other than teacher or executive or administrative officer, for personal injury or death of student. 35 A.L.R.4th 328.

Liability for injury to customer or other invitee of retail store by falling of dis-

played, stored, or piled objects. 61 A.L.R.4th 27.

Comparative fault: calculation of net recovery by applying percentage of plaintiff's fault before or after subtracting amount of settlement by less than all joint tortfeasors. 71 A.L.R.4th 1108.

Products liability: contributory negligence or assumption of risk as defense in negligence action based on failure to provide safety device for product causing injury. 75 A.L.R.4th 443.

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Modern status of rule imputing motor vehicle driver's negligence to passenger on joint venture theory. 3 A.L.R.5th 1.

Comparative negligence: judgment allocating fault in action against fewer than all potential defendants as precluding subsequent action against parties not sued in original action. 4 A.L.R.5th 753.

Applicability of comparative negligence doctrine to actions based on negligent misrepresentation. 22 A.L.R.5th 464.

Causes of action governed by limitations period in UCC § 2-725. 49 A.L.R.5th 1.

Products liability: Recovery for injury or death resulting from intentional inhalation of product's fumes or vapors to produce intoxicating or similar effect. 50 A.L.R.5th 275.

Excessiveness or adequacy of damages awarded for injuries to nerves or nervous system. 51 A.L.R.5th 467.

Excessiveness or adequacy of damages awarded for injuries causing mental or psychological damages. 52 A.L.R.5th 1.

Comparative negligence of driver as defense to enhanced injury, crashworthiness, or second collision claim. 69 A.L.R.5th 625.

Comparative negligence, contributory negligence and assumption of risk in action against owner of store, office, or similar place of business by invitee falling on

tracked-in water or snow. 83 A.L.R.5th 589.

Contributory Negligence or Comparative Negligence Based on Failure of Patient to Follow Instructions as Defense in Action Against Physician or Surgeon For Medical Malpractice. 84 A.L.R.5th 619.

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§ 11-7-17. Questions of negligence and contributory negligence for jury.

All questions of negligence and contributory negligence shall be for the jury to determine.

SOURCES: Laws, 1910, ch. 135; Codes, Hemingway's 1917, § 503; Laws, 1920, ch. 312; Laws, 1930, § 512; Laws, 1942, § 1455.

Cross References — Presumption of negligence for injury by railroads and motor vehicles, see § 13-1-123.

Liability of railroad company for negligence and mismanagement, see §§ 77-9-435 et seq.

JUDICIAL DECISIONS

1. In general.
2. Negligence generally.
3. Proximate cause.
4. Contributory negligence.
5. Comparative negligence and apportionment of damages.
6. Instructions.

1. In general.

On a motion for judgment notwithstanding the verdict, the trial court, under § 11-7-17 and Miss. Const. Art. 3 § 31, must consider all the evidence in the light and with all reasonable inferences most favorable to the party opposed to the mo-

tion, and if the facts and inferences point so strongly and overwhelmingly in favor of one party that the trial court believes that reasonable men could not have arrived at a contrary verdict, granting the motion is proper, but if there is substantial evidence opposed to the motion, such that reasonable and fair-minded men in the exercise of impartial judgment might reach different conclusions, the motion should be denied, and it is no answer to say that the jury's verdict involves speculation or conjecture. *City of Jackson v. Locklar*, 431 So. 2d 475 (Miss. 1983).

In an action by the owner of an automobile for damages arising out of the theft of the vehicle while it was in the possession of a bailee for hire, the trial court properly refused to grant a directed verdict, peremptory instruction or judgment n.o.v. in favor of the bailee where a question of negligence existed over the bailee's leaving the vehicle, with the keys placed above the sun visor, on a public street exposed to possible theft for one hour and five minutes. *City of Meridian v. Webb*, 387 So. 2d 85 (Miss. 1980).

The violation of a traffic law or safety statute may constitute negligence as a matter of law, but in order to capitalize on the violation of a safety statute by a defendant, the plaintiff must establish, in addition to a causal relation between the violation of the statute and the harm suffered, that he is one of the class of persons which the statute was intended to protect, and that the harm suffered was of the kind the statute was designed to prevent, or in other words that the harm suffered resulted from the type of risk covered by the statute. *U-Haul Co. v. White*, 232 So. 2d 705 (Miss. 1970).

A court should not, by its decree, fail to give effect to the statute. *Herrington v. Hodges*, 249 Miss. 131, 161 So. 2d 194 (1964).

In litigation, growing out of death and injuries sustained in a collision of two automobiles, filed in the chancery court in the county where letters of administration on the decedent's estates were issued, complainants charged that the accident was due to the negligence of a construction company, through its agent, in obstructing the highway, charged negligence

in the operation of his automobile on the part of another defendant, who it was alleged was an agent of a nonresident insurance company, and also charged, on information and belief, that another defendant had money and effects of the nonresident insurance company, and prayed for an attachment, where, upon appeal from the decrees in favor of complainants, the Supreme Court found no reversible error in the record, the judgment would not be reversed in view of Mississippi Constitution § 147, and while the chancery court in his discretion might have directed the trial of the case by jury, error could not be predicated upon the refusal of a jury trial. *Mathews v. Thompson*, 231 Miss. 258, 95 So. 2d 438 (1957).

This provision is not binding in a Federal court. *Mississippi Power & Light Co. v. Whitescarver*, 68 F.2d 928 (5th Cir. 1934).

This provision does not have the effect in a Federal court of making it erroneous for the court to direct a verdict where the evidence is such that a verdict the other way would be set aside. *Blass v. Virgin Pine Lumber Co.*, 50 F.2d 29 (5th Cir. 1931).

This section [Code 1942, § 1455] does not apply in the trial of a matter of purely equity jurisdiction. *Boyd v. Applewhite*, 121 Miss. 879, 84 So. 16 (1920), modified, 123 Miss. 185, 85 So. 87 (1920).

2. Negligence generally.

In an action on behalf of an infant by her parents for injuries sustained by the child when the driver of an automobile drove over her while leaving a parking space in front of the child's parents' home, the trial court properly declined to give a peremptory instruction on liability favorable to the parents where the evidence, when viewed in a light most favorable to the verdict, portrayed circumstances from which reasonable minds could find that the driver had afforded the infant all of the care which was due under the circumstances, including the presence of her parents in the immediate vicinity, and where the evidence did not establish as a matter of law that the driver had violated the duty imposed by statute to "exercise proper precaution upon observing any child or any confused or incapacitated

person upon a roadway." *Haver v. Hinson*, 385 So. 2d 605 (Miss. 1980).

Questions of negligence are for the jury's determination. Where, however, there is no issue of fact, then the court determines the negligence question. *McGee v. Bolen*, 369 So. 2d 486 (Miss. 1979).

In action against bank for having negligently lost deposit made by plaintiff, the issue as to whether or not the bank exercised reasonable care in finding the lost deposit was a question for the determination of the jury. *First Nat'l Bank v. Langley*, 314 So. 2d 324, 77 A.L.R.3d 570 (Miss. 1975).

Where plaintiff's case was based on the negligence of defendant and the only answer of defendant was an affirmative defense, the county court erred in disposing of the case at a preliminary hearing on the motion to dismiss, thereby denying plaintiff the right to present his case to the jury on the facts. *Gates v. Owen Chevrolet Co.*, 294 So. 2d 179 (Miss. 1974).

All questions of negligence and contributory negligence are for the jury to decide under proper instructions of the court as to the applicable principles of law involved. *Smith v. Walton*, 271 So. 2d 409 (Miss. 1973).

Where the evidence showed that the defendant's vision, as she approached a smoke covered portion of the highway, slowing her automobile to approximately 30 miles per hour was restricted to approximately one and one-half car lengths in front of her automobile, it was never entirely obscured, the question of the defendant's negligence in colliding with another vehicle traveling in the opposite direction in defendant's lane while passing another vehicle was for the jury, precluding a peremptory instruction as to defendants liability in a suit for personal injuries. *Butler v. Chrestman*, 264 So. 2d 812, 69 A.L.R.3d 546 (Miss. 1972).

When a motorist is driving at a reasonable rate of speed and is obeying the rules of the road, he is not liable for injuries to a child who darts out from behind a fence or a parked or stopped vehicle so suddenly that the motorist cannot stop or otherwise avoid injuring the child. *Dorrrough v. State*, 245 So. 2d 188 (Miss. 1971).

In an action by a passenger against the defendant of an automobile for personal

injuries sustained when the driver lost control of the automobile on a curve, evidence as to the driver's intoxicated condition and touching on the question of assumption of the risk by the passenger, presented an issue for the jury. *Griffin v. Holliday*, 233 So. 2d 820 (Miss. 1970).

Assumption of the risk as a complete defense to an action for negligence is a viable doctrine in Mississippi in cases other than master and servant relationships, and ordinarily its application is for the trier of fact. *Wright v. Standard Oil Co.*, 319 F. Supp. 1364 (N.D. Miss. 1970), rev'd on other grounds, 470 F.2d 1280 (5th Cir. 1972), reh'g denied, 471 F.2d 650 (5th Cir. 1973).

Where a father did not have a conscious purpose or intention that his son should recross a highway unattended and be exposed to known danger in so doing, and had no actual knowledge of negligent vehicular operation by third parties which would increase the danger to his child beyond that posed by ordinary traffic hazards, it could not be said that he assumed the risk of the child's injury under Mississippi law. *Wright v. Standard Oil Co.*, 319 F. Supp. 1364 (N.D. Miss. 1970), rev'd on other grounds, 470 F.2d 1280 (5th Cir. 1972), reh'g denied, 471 F.2d 650 (5th Cir. 1973).

In an action for injuries by one injured by an elevator while on defendant's premises for the purpose of installing equipment, the defendant's motion for judgment notwithstanding the verdict should have been sustained where the plaintiff failed to establish a causal connection between any defect in the elevator and the plaintiff's injury, and thus there was no issue for the jury's determination. *General Tire & Rubber Co. v. Darnell*, 221 So. 2d 104 (Miss. 1969).

Where defendant driver of overtaken truck permitted his vehicle to drift across the centerline and speeded up when plaintiff attempted to pass on the left, the evidence was sufficient to raise a jury question on the issue of the truckdriver's negligence. *Lewis Grocery Co. v. Blackwell*, 209 So. 2d 639 (Miss. 1968).

Code 1942, § 8215 should be construed in a practical manner, and it does not mean that a motorist forced to stop mo-

mentarily upon the paved portion of a highway because the vehicle in front of him stopped and oncoming traffic prevented him from passing is guilty of negligence in not immediately driving from the highway onto the shoulder. *Whitten v. Land*, 188 So. 2d 246 (Miss. 1966).

To instruct the jury for the plaintiff in an automobile collision action that jury could not find him guilty of contributory negligence because of the comparative negligence statute was error. *Whitten v. Land*, 188 So. 2d 246 (Miss. 1966).

The legislature has adopted, as a statutory policy, the general rule that the issue of negligence and contributory negligence are to be determined by the jury, and ordinarily such issues should not be disposed of by the court in a peremptory manner. *DeLaughter v. Womack*, 250 Miss. 190, 164 So. 2d 762 (1964), overruled on other grounds, *Hall v. Hilbun*, 466 So. 2d 856 (Miss. 1985).

A jury's verdict for defendants may not be set aside because the evidence was sharply conflicting and the credibility of a witness was open to question. *Gaskin v. Davis*, 246 Miss. 166, 149 So. 2d 850 (1963).

Evidence warranted jury in automobile collision case in finding negligence and contributory negligence. *Hawkins v. Hillman*, 245 Miss. 385, 149 So. 2d 17 (1963).

Negligence in turning a corner rapidly into the entrance of a building while pushing a heavy hand cart, at a time and place where collision with a pedestrian might reasonably have been foreseen, is for the jury. *Dr. Pepper Bottling Co. v. Bruner*, 245 Miss. 276, 148 So. 2d 199 (1962).

In bowler's action to recover for damages for injuries sustained in fall allegedly due to the negligence of the bowling establishment proprietor, questions as to assumption of risks and contributory negligence should have gone to jury under proper instructions. *Elias v. New Laurel Radio Station, Inc.*, 245 Miss. 170, 146 So. 2d 558, 92 A.L.R.2d 1065 (1962).

In an action for damages predicated upon the negligence of an electrical power company in failing to cut off electric power after it had notice that eight of plaintiff's cows had been electrocuted by a fallen

wire, defenses suggesting that, since plaintiff could not possibly eat the flesh of eight cows, it was his intention to prepare the carcasses for illegal sale to the public for food, and also alleging that the power company had remedied the dangerous situation almost immediately, presented jury questions. *King v. Mississippi Power & Light Co.*, 244 Miss. 486, 142 So. 2d 222 (1962).

The operator of an airplane may be found to have been negligent where his take-off from a pasture in which he had landed caused the cattle grazing therein to stampede. *Brunt v. Chicago Mill & Lumber Co.*, 243 Miss. 607, 139 So. 2d 380 (1962).

Negligence and contributory negligence are jury questions. *Louisville & N.R. Co. v. Price*, 243 Miss. 99, 137 So. 2d 787 (1962).

A verdict on conflicting evidence in a negligence case will be set aside only if clearly against the weight of evidence or influenced by passion, prejudice or corruption. *Schumpert v. Watson*, 241 Miss. 199, 129 So. 2d 627 (1961), overruled on other grounds, *Hollingsworth v. Bovaird Supply Co.*, 465 So. 2d 311 (Miss. 1985).

Responsibility for collision of truck and bus which entered intersection without stopping is for the jury. *Greyhound Corp. v. Kindle*, 240 Miss. 702, 128 So. 2d 567 (1961).

Conflict of testimony as to the speed of a train presents a question for the jury. *New Orleans & N.E.R. Co. v. Shows*, 240 Miss. 604, 128 So. 2d 381 (1961).

A typical jury question is presented where each party introduces evidence to show that the cause of an automobile collision was the negligence of the other. *Ferguson v. Denton*, 239 Miss. 591, 124 So. 2d 279 (1960).

In an action for personal injuries sustained by a plaintiff when his automobile was struck from the rear by the defendant's automobile, where the evidence presented jury questions as to whether the defendant was negligent in driving at an excessive speed, or following another vehicle too closely, or in failing to have his vehicle under proper control, or whether the sole proximate cause of the collision was the manner in which the plaintiff's vehicle was driven into the intersection,

the trial court erred in directing a verdict for plaintiff on the issue of liability. *Buntyn v. Robinson*, 233 Miss. 360, 102 So. 2d 126 (1958).

In an action for personal injuries and property damages arising out of a collision between plaintiff's automobile and that of the defendant when defendant allegedly drove, without stopping, from a private driveway into the highway upon which plaintiff was proceeding in such manner that plaintiff could not avoid striking him, conflicting evidence raised jury questions as to defendant's negligence, and whether his negligence was the proximate cause of the accident. *Stewart v. Madden*, 233 Miss. 206, 101 So. 2d 353 (1958).

In a wrongful death action arising out of defendant's automobile colliding with a bicycle ridden by a nine-year old child upon the highway, jury's verdict for defendant was against the overwhelming weight of the evidence where it appeared that the road in the vicinity of the accident was straight and defendant's view was entirely unobstructed, and the defendant testified that he had seen the boy on the bicycle for a distance of several hundred feet before overtaking him, and yet had neither sounded his horn nor applied his brakes until he was within 12 or 15 feet of the boy, when it was too late to avoid hitting him. *Moak v. Black*, 230 Miss. 337, 92 So. 2d 845 (1957).

Upon a motion for a directed verdict, all the facts testified to, and all inferences necessarily and logically to be deduced therefrom, are to be taken as true in favor of the party against whom the motion is asked, and the case should not be withdrawn from the jury unless the conclusion follows as a matter of law that no recovery could be had upon any view which could be properly taken of the facts which the evidence tends to establish; but if more than one reasonable inference can be garnered from the facts, the question of negligence is for the jury. *Mock v. Natchez Garden Club*, 230 Miss. 377, 92 So. 2d 562 (1957).

In an action by parents to recover for the death of their son who, while swimming at nighttime, drowned in defendant's swimming pool which had been engaged by a church group, evidence as to

the adequacy of the lighting at the swimming pool and the possible negligence of the defendant's life guard raised questions for the jury as to defendant's liability, and the trial court erred in peremptorily directing a jury verdict for defendant. *Mock v. Natchez Garden Club*, 230 Miss. 377, 92 So. 2d 562 (1957).

Where a case turns upon circumstantial evidence it should rarely be taken from the jury. *Cameron v. Hootsell*, 229 Miss. 80, 90 So. 2d 195 (1956).

In an action against a lumber company for injuries sustained when plaintiff was struck by a piece of lumber which allegedly fell off the lumber company's truck while plaintiff was walking along the side of the street at a point where there were no sidewalks, circumstantial evidence presented questions of fact for jury's determination as to whether the truck in question was that of the lumber company, and was being negligently operated on the occasion in question by the servant or agent of the lumber company acting within the scope of his employment, and in furtherance of his master's business. *Cameron v. Hootsell*, 229 Miss. 80, 90 So. 2d 195 (1956).

In an action for injuries incurred by plaintiff bicyclist when, approaching defendant's truck from rear, he tried to pass it at an intersection, was hit by the truck as it also started to turn right, and was catapulted in the pathway of another car, the degrees of negligence were for the jury to determine. *Cochran v. Peeler*, 209 Miss. 394, 47 So. 2d 806 (1950).

This statute [Code 1942, § 1455] does not change fundamental condition that in action to recover for negligence there must be negligence, and without it, there is nothing for jury. *Mississippi Butane Gas Sys. Co. v. Welch*, 208 Miss. 637, 45 So. 2d 262 (1950).

In advertiser's action against publisher of newspaper for negligence in publishing advertisement that stock of clothing will be sold for greater discount than that intended by advertiser, it is for jury to say whether course followed by advertiser in selling at advertised price was so reasonable as to constitute foreseeable result of publisher's negligence, whether such course was made reasonable by conduct

and assurance of publisher as to his responsibility or was result of advertiser's own independent judgment, and whether such judgment was exercised reasonably and without reasonably available mitigating alternative. *Meridian Star v. Kay*, 207 Miss. 78, 41 So. 2d 30, 10 A.L.R.2d 677 (1949), error overruled 207 Miss. 78, 41 So. 2d 746, 10 A.L.R.2d 677.

Danger and negligence are not synonymous, nor is the existence of a defect, of necessity, either danger or negligence. *Ming v. City of Jackson*, 202 Miss. 260, 31 So. 2d 900 (1947).

In action by truck driver for oil company for injuries sustained while delivering fuel for defendant contractor's tractors and other machines located between levee and river when caught between oil truck and defendant's caterpillar tractor used in pulling the truck over the levee which suddenly rolled down the incline, whether the assistance intended to be given the plaintiff in attempting to pull the truck over the levee was in the course of the defendant's business or merely an act of unselfish generosity, whether the caterpillar tractor had defective brakes or defective brake-locks which caused the tractor to roll against the plaintiff, and, if so, whether such defects amounted to failure on defendant's part to exercise reasonable care for plaintiff's safety, were questions for the jury. *Sugg v. Hendrix*, 153 F.2d 240 (5th Cir. 1946).

3. Proximate cause.

In a wrongful death action arising out of a collision between an automobile in which decedent was riding and defendant's train at a railroad crossing on a foggy night, under conflicting evidence, the question of whether the alleged negligence of the railroad company in blocking the crossing for a period of more than five minutes, in violation of Code 1942, § 7780, was the effective cause of the accident, or whether the accident was due solely to the negligence of the driver of the car, was for the jury. *Green v. Gulf, M. & O.R. Co.*, 244 Miss. 211, 141 So. 2d 216 (1962).

Since there was no substantial evidence of negligence on the part of the railroad, and the sole proximate cause of decedent's death was his failure to look and listen

prior to driving his automobile onto the crossing in front of defendant's approaching train, judgment for plaintiff would be reversed and judgment entered in the Supreme Court for the railroad. *Illinois Cent. R.R. v. Smith*, 243 Miss. 766, 140 So. 2d 856 (1962).

Although motorist's failure to stop before attempting to cross railroad tracks was negligence contributing to the collision with a railroad switch engine, trial court properly refused railroad's requested preemptory instruction where the evidence presented questions for the jury as to whether the proximate cause of the collision was the failure of the railroad to ring the bell on its engine, or the negligence of the railroad's engineer in failing to stop the engine when the engineer saw that motorist's automobile was not going to stop. *New Orleans & N.E.R. Co. v. Ready*, 238 Miss. 199, 118 So. 2d 185 (1960).

In an action against a driver by a share-the-expense guest for injuries allegedly sustained when the driver's automobile foot brake failed to function properly so that the automobile collided into the rear of another which had come to a stop, the question of whether the driver was negligent in failing to exercise such care, after her foot brake failed to work, as a reasonably prudent and capable driver would have used under the unusual circumstances to avoid an accident, and whether such negligence, if any, was the proximate cause of the guest's injury, were for the jury. *Moore v. Taggart*, 233 Miss. 389, 102 So. 2d 333 (1958).

In an action for personal injuries and property damages arising out of a collision between plaintiff's automobile and that of the defendant when defendant allegedly drove, without stopping, from a private driveway into the highway upon which plaintiff was proceeding in such manner that plaintiff could not avoid striking him, conflicting evidence raised jury questions as to defendant's negligence, and whether his negligence was the proximate cause of the accident. *Stewart v. Madden*, 233 Miss. 206, 101 So. 2d 353 (1958).

Where a motorist approaching an intersection with the signal lights flashing red in her direction, failed to stop before en-

tering therein, the court properly submitted to the jury the issue of whether such negligence was the sole cause of the collision. *Bates v. Walker*, 232 Miss. 804, 100 So. 2d 611 (1958).

In an action for the death of an eight-year-old child killed when struck by a large diesel trailer truck which was not equipped with service brakes, jury questions were presented, under conflicting evidence, as to whether the truck driver was negligent in driving at a speed in excess of 45 miles an hour, in failing to maintain a proper lookout and observing the movements of a child crossing the highway in time to avoid injuring her, in failing to maintain proper control of his vehicle after he saw or, by the exercise of reasonable care, should have seen the child on the highway, and the driver's negligence, if any, was the proximate or contributing cause of the death of the child. *Reed v. State*, 232 Miss. 432, 99 So. 2d 455 (1958).

In an action against a railroad and its engineer for damages to a tractor trailer caused by a crossing collision, where the evidence established that the railroad and its engineer was liable as a matter of law, but also raised jury questions as to the contributory negligence, if any, of the truck driver, whether under the comparative negligence statute plaintiff's damages sustained should have been diminished, whether the negligence of the engineer was the sole, proximate cause of the collision, and the applicability of the last clear chance doctrine, the case was reversed and remanded for submission to a jury on issues of damages alone. *New Orleans & N.E.R. Co. v. Dixie Hwy. Express, Inc.*, 230 Miss. 92, 92 So. 2d 455 (1957).

In an action by a farm equipment mechanic, employed by defendant, to recover for injuries sustained when the arms of the defendant's cotton picker flew up crushing his right arm, where it appeared that before the plaintiff had arrived at the farm the defendant had taken the head off of the cotton picker, without releasing the tension, leaving the machine in a dangerous condition to be worked on, it was for the jury to determine whether the defendant should have told the plaintiff that the tension had not been released, and

whether his failure to apprise plaintiff of that fact constituted negligence, which proximately caused or contributed to plaintiff's injury. *Cole v. Tullos*, 228 Miss. 815, 90 So. 2d 32 (1956).

In an action by a bicyclist against a cab company for injuries suffered when he jumped off the bicycle to avoid being crushed by the cab against a van type truck ahead, the question of excessive speed of the cab and the proximate cause of the negligence was for the jury. *Coker v. Five-Two Taxi Serv.*, 211 Miss. 820, 52 So. 2d 356 (1951), error overruled, 211 Miss. 826, 52 So. 2d 835 (1951).

It is for jury to determine whether defendant's negligence in not raising trap door over train steps so as to permit plaintiff to alight from bottom step was direct, contributing cause of plaintiff's injuries, where plaintiff had assisted passenger aboard train and those in charge of train permitted plaintiff to alight while train was moving. *McClellan v. Illinois Cent. R.R.*, 204 Miss. 432, 37 So. 2d 738 (1948).

In an action against an electric power company for the death of one of its linemen, electrocuted when he came in contact with a high voltage wire while engaged in work on a pole, whether the company was negligent or the lineman was negligent in failing to cut off the power, or insulate the wire with a rubber blanket, proximately causing the injury, was for the jury to determine. *Mississippi Power & Light Co. v. Merritt*, 194 Miss. 794, 12 So. 2d 527 (1943).

The negligence of the defendant complained of must be the proximate cause of the injury. *Hines v. Moore*, 124 Miss. 500, 87 So. 1 (1921).

4. Contributory negligence.

A plaintiff in a personal injury action was not entitled to an additur under § 11-1-55 to increase a \$2,000 damages award, even though the plaintiff had introduced medical bills incurred in the treatment of his injuries which totalled \$2,085.90 and he claimed that the jury had failed to consider his claims for pain, suffering and lost wages, where it was apparent that the jury believed that the plaintiff was somewhat responsible for his own injuries and accordingly reduced his award of damages

to the amount of \$2,000; a determination that the jury was incorrect in assessing the plaintiff's contributory negligence would be tantamount to holding that a jury is to be instructed that it must return a verdict for all alleged damages, which is not a proper statement of the law. *Leach v. Leach*, 597 So. 2d 1295 (Miss. 1992).

In medical malpractice case, court may not remove issue of contributory negligence from consideration of jury where defendant physician has introduced proof that patient did not seek follow-up treatment and had been neglectful of patient's physical condition. *Reikes v. Martin*, 471 So. 2d 385 (Miss. 1985).

Where on a new trial, granted because of an erroneous instruction on contributory negligence, damages alone should be submitted to the jury, but the defendant may assert, in diminution of damages, any negligence on the part of plaintiff's decedent which can be shown to have contributed to the injuries sustained by the decedent. *Glover v. Daniels*, 310 F. Supp. 750 (N.D. Miss. 1970).

In an action for injuries sustained by a trucker when his truck overturned, the question whether a fishery manager's negligence in directing the truck to be driven on a wet levee was superseded by the plaintiff's negligence, in undertaking to dump his truck there, was for the jury. *Daves v. Reed*, 222 So. 2d 411 (Miss. 1969).

In an action for injuries sustained by a trucker when his truck overturned, the question as to whether the trucker fully appreciated the danger involved in driving his truck on a wet levee, and voluntarily assumed the consequences of his actions, was for the jury. *Daves v. Reed*, 222 So. 2d 411 (Miss. 1969).

The fact that the plaintiff motorist may have been guilty of considerable contributory negligence does not per se bar him from the right of recovery. *Lewis Grocery Co. v. Blackwell*, 209 So. 2d 639 (Miss. 1968).

The fact that the plaintiff was guilty of contributory negligence does not per se make the verdict of the jury contrary to the overwhelming weight of the evidence, assuming that the defendant was negligent. *Philco Distribs., Inc. v. Herron*, 195 So. 2d 473 (Miss. 1967).

The legislature has adopted, as a statutory policy, the general rule that the issue of negligence and contributory negligence are to be determined by the jury, and ordinarily such issues should not be disposed of by the court in a peremptory manner. *DeLaughter v. Womack*, 250 Miss. 190, 164 So. 2d 762 (1964), overruled on other grounds, *Hall v. Hilbun*, 466 So. 2d 856 (Miss. 1985).

In an action for damages resulting when defendant's truck-trailer unit ran into the rear end of plaintiff's truck-trailer unit on the curved portion of the highway, the court did not err in refusing to charge the defendant's driver with negligence in respect to speeding, overtaking on the right, and following too closely, particularly in view of this section [Code 1942, § 1455]. *Green Truck Lines v. Hooper*, 233 Miss. 794, 103 So. 2d 443 (1958).

In an action by an owner of a truck against a corporation for damages for property and personal injuries arising out of an accident allegedly caused by the negligence of the corporation's agent in blocking a temporary bypass with his automobile and another that he had been towing, the question of whether the truck owner was negligent in failing to stop prior to the accident when he was blinded, or almost blinded, by the lights of the agent's car, was for the jury. *Commercial Credit Corp. v. Smith*, 231 Miss. 574, 96 So. 2d 911 (1957).

In an action for personal injuries sustained by plaintiff when the pickup truck which he was driving collided with a bus which was parked one-half thereof on a paved portion of highway to discharge passenger, where evidence showed that it was raining and visibility was poor and that the plaintiff was traveling only about twenty-five or thirty miles per hour and that the lights on the bus were so dim that the plaintiff could not see them until he was within twenty-five or thirty feet of the bus, the question of contributory negligence is for the jury to determine. *Continental S. Lines v. Williams*, 226 Miss. 624, 85 So. 2d 179 (1956), error overruled 226 Miss. 624, 85 So. 2d 910.

Code 1930, §§ 511 and 512, (Code 1942, §§ 1454 and 1455) abolished contributory negligence as a defense and makes negli-

gence and contributory negligence questions for the jury to determine. *Mississippi Power & Light Co. v. Merritt*, 194 Miss. 794, 12 So. 2d 527 (1943).

Whether motorist whose automobile struck a gondola car spotted by railroad employees so that it extended partly across public highway was contributorily negligent held for jury. *Magers v. Okolona, H. & C.C. R.R.*, 174 Miss. 860, 165 So. 416 (1936).

By reason of this provision (Hemingway's Code 1917, § 503), it is proper to refuse a charge that a defendant is not liable if the plaintiff is guilty of contributory negligence. *Reynolds-West Lumber Co. v. Kellum*, 19 F.2d 72 (5th Cir. 1927).

5. Comparative negligence and apportionment of damages.

A personal injury case would be reversed and remanded for trial in order for the jury to find liability, if any, under the comparative negligence principles of § 11-7-17 where it was apparent from the lower court's order granting summary judgment that the court found the existence of an "open and obvious" danger in making its determination, since the "open and obvious" defense has been abolished. *Baptiste v. Jitney Jungle Stores of Am., Inc.*, 651 So. 2d 1063 (Miss. 1995).

The "open and obvious" defense to negligence actions would be abolished, and damages would be determined through application of the true comparative negligence doctrine; thus, a trial judge erred in construing the open and obvious defense as a complete bar to the recovery of damages, since it should only be used to mitigate damages on a comparative negligence basis under § 11-7-15. *Tharp v. Bunge Corp.*, 641 So. 2d 20 (Miss. 1994).

Under this jurisdiction's comparative negligence statute, it is for the jury to decide not only all questions of negligence, but also whether it will diminish the damages in proportion to the amount of the negligence attributable to the plaintiff, even if no instruction to this effect is requested by either party. *Medley v. Carter*, 234 So. 2d 334 (Miss. 1970).

The evidence created a question for the jury as to the comparative negligence of a westbound motorist whose vehicle came to rest in the center of the highway after

colliding with an oncoming motorist, and an eastbound motorist who collided with the vehicle shortly after the first collision, and the trial judge erred in setting aside the jury verdict and rendering a judgment notwithstanding the verdict for the westbound motorist. *Medley v. Carter*, 234 So. 2d 334 (Miss. 1970).

Where two Mississippi motorists were killed in an automobile collision which occurred in Louisiana, their estates were being administered in Mississippi, and their administratrices had respectively filed in a Mississippi court an action and counterclaim for damages as a consequence of the deaths of the decedents, the issues of liability under both the declaration and counterclaim should have been submitted to the jury by appropriate instructions under the Mississippi comparative negligence statute, despite the fact that the law of Louisiana, where the fatal collision occurred, barred a recovery where contributory negligence is established. *Mitchell v. Craft*, 211 So. 2d 509 (Miss. 1968).

Although the defendant in a wrongful death action did not ask for or receive an instruction on contributory negligence, the jury had the right to apply the comparative negligence statute without an instruction to that effect. *Winstead v. Hall*, 251 Miss. 800, 171 So. 2d 354 (1965).

Damages for personal injury will not be held grossly inadequate where jury, in determining amount, may have found contributory negligence. *Ramsey v. Price*, 249 Miss. 192, 161 So. 2d 778 (1964).

Where there is evidence warranting the jury in finding contributory negligence, an appellate court may not set aside a verdict on the ground of inadequacy of damages. *Gore v. Patrick*, 246 Miss. 715, 150 So. 2d 169 (1963).

Question of the extent to which recovery for negligence is reduced by the injured person's contributory negligence is for the trier of the facts. *Illinois Cent. R.R. v. Williams*, 242 Miss. 586, 135 So. 2d 831 (1961).

On a retrial of a negligence action on the issue of damages alone, the evidence should not be limited to the question of damages, but facts should be presented as to the negligence of all the parties, and the

jury could apportion damages under the comparative negligence statute. *Jenkins v. Cogan*, 238 Miss. 543, 119 So. 2d 363 (1960); *Carlisle v. Cobb Bros. Constr. Co.*, 238 Miss. 681, 119 So. 2d 918 (1960).

It is for the jury to decide whether it will diminish the damages in proportion to the amount of negligence attributable to the plaintiff when under all the testimony and circumstances thereby shown a part of the negligence contributing to plaintiff's injuries was attributable to his own negligence, even if no instruction to this effect is requested by either party. *Mutual Life Ins. Co. v. Rather*, 221 Miss. 527, 73 So. 2d 163 (1954).

In an action for injuries sustained by plaintiff who was struck by an automobile while standing on the shoulder of a highway waiting for a ride, a finding that the plaintiff had stepped into the highway in front of an automobile was not supported by evidence and therefore did not warrant the jury in employing the comparative negligence doctrine, and a new trial would be granted on the issue of damages alone when all the facts should be presented to the jury on the question of negligence and the jury will have the right to apportion the damages under the comparative negligence statute. *Vaughan v. Bollis*, 221 Miss. 589, 73 So. 2d 160 (1954).

In a proceeding on libel for collision, damages would be apportioned equally in a case where both parties had been at fault to the extent of twenty per cent and eighty per cent. *Adams v. Construction Aggregates Corp.*, 125 F. Supp. 110 (D.N.Y. 1954), *aff'd*, 237 F.2d 884 (2d Cir. N.Y. 1956), *cert. denied*, 352 U.S. 971, 77 S. Ct. 364, 1 L. Ed. 2d 325 (1957).

6. Instructions.

In an action by an employee against his employer arising from an on-the-job injury, the trial court properly granted the employee peremptory instructions on contributory negligence and assumption of the risk, even though § 11-7-17 provides that "all questions of negligence and contributory negligence shall be for the jury to determine," where there was no proof indicating that any potential negligence or assumption of the risk by the employee led to the injury. *Mayor & Bd. of Aldermen v. Young*, 616 So. 2d 883 (Miss. 1992).

When there is evidence to support a comparative negligence instruction, it is not error to give the instruction even though each party may contend that the other was entirely at fault. *Pham v. Welter*, 542 So. 2d 884 (Miss. 1989).

In an action for damages arising out of an automobile collision in which the plaintiff's car was struck by that of the defendant, the trial court erred in giving a preemptory instruction that the plaintiff had been guilty of negligence in failing to keep a reasonable lookout to the rear of her vehicle before turning off a highway where the plaintiff's testimony about her actions prior to the collision raised a question of fact for the jury as to whether she had taken all reasonable precautions prior to making the turn. *Kennedy v. Reed*, 393 So. 2d 480 (Miss. 1981).

In an action for personal injuries, an instruction that the driver of a pickup truck, which ran over a motorcyclist after he had been thrown to the highway following a collision with the defendant's automobile, was negligent in the operation of his truck, and if the jury believed from a preponderance of the evidence that the negligence of the truck driver contributed to the motorcyclist's injury, then the defendant was not responsible for such of the motorcyclist's injuries which were caused by the negligence of the truck-driver unless the jury should believe from a preponderance of the evidence that such negligence was foreseeable by the defendant, could not be construed as being in effect a preemptory instruction to find for the defendant. *Ratliff v. Nail*, 231 So. 2d 798 (Miss. 1970).

It was erroneous to grant the "emergency instruction" where it raised an inference that if the driver of a truck had suddenly turned his vehicle across the center line into the left lane of the highway at the time when the defendant's bus was about to pass, that then the defendant was not guilty of contributory negligence in driving at an unlawful speed and approaching the truck at an unreasonable rate in an unreasonable manner. *Peel v. Gulf Transp. Co.*, 252 Miss. 797, 174 So. 2d 377 (1965).

Where facts constituting contributory negligence are pleaded and proved, a re-

quest to instruct on contributory negligence is not essential to enable the jury to consider it in assessing damages. *Herrington v. Hodges*, 249 Miss. 131, 161 So. 2d 194 (1964).

Instruction in action for alleged negligent installation of machine that jury should find for defendant if they found that the machine was not being handled properly by plaintiff, held erroneous. *Pevey v. Alexander Pool Co.*, 244 Miss. 25, 139 So. 2d 847 (1962).

In an action for injuries sustained by a 16-year-old motorcyclist in an intersectional collision with a truck, the driver of which had, contrary to Code 1942, § 8189(a), and a city ordinance, "cut the corner" in making a left turn, court prop-

erly instructed that the truck driver was guilty of negligence, and that plaintiff could recover on account thereof, if such negligence was a proximate, contributing cause of the collision, which question was for the jury. *City of Jackson v. Reed*, 233 Miss. 304, 103 So. 2d 6 (1958), overruled on other grounds, *City of Jackson v. Williamson*, 1999 Miss. Lexis 89 (Miss. Feb. 25, 1999).

Instruction permitting jury to consider plaintiff's contributory negligence, if any, in diminution of damages, where not pleaded, if error, held harmless where jury found plaintiff's negligence was sole proximate cause of injury. *White v. Weitz*, 169 Miss. 102, 152 So. 484 (1934).

RESEARCH REFERENCES

ALR. Libel and slander: necessity of expert testimony to establish negligence of media defendant in defamation action by private individual. 37 A.L.R.4th 987.

Malpractice: Physician's liability for injury or death resulting from side effects of drugs intentionally administered to or prescribed for patient. 47 A.L.R.5th 433.

Am Jur. 22 Am. Jur. 2d, Death §§ 223-264.

57 Am. Jur. 2d, Negligence §§ 69, 70.

18 Am. Jur. Pl & Pr Forms (Rev), Negligence, Forms 291, 292 (Instruction to jury defining comparative negligence).

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ligence, Forms 293, 294 (Instruction to jury as to comparative negligence of multiple defendants).

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65 C.J.S., Negligence §§ 834-869.

Law Reviews. 1979 Mississippi Supreme Court Review: Torts. 50 Miss. L. J. 887, December 1979.

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Practice References. 3 Am Law Prod Liab 3d, Contributory Negligence; Comparative Fault § 40:7.

§ 11-7-18. Limitation of remedies or disclaimer of liability as to certain implied warranties prohibited.

Except as otherwise provided in Sections 75-2-314, 75-2-315, 75-2-315.1 and 75-2-719, there shall be no limitation of remedies or disclaimer of liability as to any implied warranty of merchantability or fitness for a particular purpose.

SOURCES: Laws, 1976, ch. 385, § 3; Laws, 1998, ch. 513, § 5, eff from and after July 1, 1998.

Cross References — Similar statutory provision embodied in the Uniform Commercial Code, see § 75-2-719.

JUDICIAL DECISIONS

1. In general.

Provision of contract for extermination of pests which limited homeowner's remedy for breach of express warranty to reinspection and refumigation in event of reinfestation, was enforceable under Mississippi law. Facts did not fall within protections afforded by §§ 11-7-18 or 75-2-315.1, and litigation not involve claim for breach of implied warranties. Moreover even if defendant had attempted to limit implied warranties, plaintiff did not seek remedies based thereon. In addition, contract was one primarily for service, whereas prohibition on limitation of express warranties applies only to manufacturer of consumer goods, thus there was nothing in Mississippi statutes forbidding limitation of remedies for breach of express warranty provided in service contract. *Smith v. Orkin Exterminating Co.*,

791 F. Supp. 1137 (S.D. Miss. 1990), *aff'd*, 943 F.2d 1314 (5th Cir. 1991).

Implied warranty of merchantability may not be waived or disclaimed in Mississippi as result of §§ 11-7-18 and 75-2-719(4). *Beck Enters., Inc. v. Hester*, 512 So. 2d 672 (Miss. 1987).

Heat pump manufacturer's attempt in its express limited warranty to limit its liability as to any implied warranty was invalid. *Fedders Corp. v. Boatright*, 493 So. 2d 301 (Miss. 1986).

Mississippi Code § 11-7-18 does not create warranties; it saves warranties otherwise existing. Language in a copier-equipment lease disclaiming implied warranties of fitness for purpose and merchantability is rendered inoperative by Mississippi Code § 11-7-18. *J.L. Teel Co. v. Houston United Sales, Inc.*, 491 So. 2d 851 (Miss. 1986).

RESEARCH REFERENCES

ALR. Validity of disclaimer of warranty clauses in sale of new automobile. 54 A.L.R.3d 1217.

Application of comparative negligence in action based on gross negligence, recklessness, or the like. 10 A.L.R.4th 946.

Unconscionability, under UCC § 2-302 or § 2-719(3), of disclaimer of warranties

or limitation or exclusion of damages in contract subject to UCC Article 2 (Sales). 38 A.L.R.4th 25.

Law Reviews. Alldredge, Uniform Commercial Code — Should the U.C.C. furnish rules of decision in equipment leasing controversies? 7 Miss. C. L. Rev. 209, Spring, 1987.

§ 11-7-19. No assumption of risk by employee when the master is negligent; exception as to certain employees.

In all actions for personal injury to an employee, and in all actions where such injury results in death, such employee shall not be held to have assumed the risks of his employment in any case where such injury or death results in whole or in part from the negligence of the master. This rule shall not apply to conductors, or locomotive engineers, in charge of dangerous or unsafe cars or engines voluntarily operated by them.

SOURCES: Laws, 1914, ch. 156; Codes, Hemingway's 1917, § 504; Laws, 1930, § 513; Laws, 1942, § 1456.

JUDICIAL DECISIONS

1. In general.
2. Assumption of risk; application.
3. Simple tool doctrine.

4. Conductors and engineers.
5. Knowledge of danger or defect, effect of.

6. Questions for jury.
7. Instructions.

1. In general.

Assumption of the risk is governed by the subjective standard of the plaintiff himself whereas contributory negligence is measured by the objective standard of a reasonable man. *McMillan v. McMillan*, 262 So. 2d 781 (Miss. 1972).

The statute [Code 1942, § 1456] abolishes the assumption of risk only as between master and servant where the master is negligent, and does not abolish the assumption of risk by an independent contractor. *United Roofing & Siding Co. v. Seefeld*, 222 So. 2d 406 (Miss. 1969).

Under Code 1942, § 1454, limiting application of contributory negligence, and under this section [Code 1942, § 1456], when negligence has once been shown on part of master followed by injury to servant, the only way master can entirely escape liability is to show his negligence was not a proximate cause of the injury or that the servant's own negligence, or negligence of fellow-servant, was the sole proximate cause of the plaintiff's injury. *Oakes v. Mohon*, 208 Miss. 478, 44 So. 2d 551 (1950).

Where negligence of an employer is shown, this statute [Code 1942, § 1456] abolishes the defense of assumption of risk. *Ingalls Shipbuilding Corp. v. Trehern*, 155 F.2d 202 (5th Cir. 1946).

The common-law principles touching liability of master and servant are in force in Mississippi, with slight modifications. *Holliday v. Fulton Band Mill*, 142 F.2d 1006 (5th Cir. 1944).

Under this statute [Code 1942, § 1456], assumption of the risk is not a defense to suits by employees. *Montgomery Ward & Co. v. Lindsey*, 104 F.2d 882 (5th Cir. 1939).

Under this provision an employee does not assume the risk resulting from his employer's negligence. *Southern Kraft Corp. v. Parnell*, 65 F.2d 785 (5th Cir. 1933).

Under this statute [Code 1942, § 1456], the doctrine of assumption of risk does not apply to risks of employment that are attributable in whole or in part to the employer's negligence. *Motor Wheel Corp. v. Dodson*, 23 F.2d 282 (5th Cir. 1927).

This section [Code 1942, § 1456] abolishes the doctrine of the assumption of risks. *Mississippi Power & Light Co. v. Merritt*, 194 Miss. 794, 12 So. 2d 527 (1943).

The common-law doctrine of assumption of risk is in full force in Mississippi, except as between master and servant. *McDonald v. Wilmot Gas & Oil Co.*, 180 Miss. 350, 176 So. 395 (1937).

2. Assumption of risk; application.

Where an employee knew by past experience with an animal that the horse had thrown employee on two previous occasions, and knew of the dangerous character of the horse, and the employer required the employee to ride the horse in connection with his work and in compliance the employee was injured by the horse, in suit for injuries sustained by the employee, he is not barred of recovery on the ground that he assumed the risk. *Grillis v. Patrick*, 214 Miss. 747, 59 So. 2d 341 (1952).

It was the duty of the foreman of an ax crew when handling a highly dangerous explosive to use reasonable care to see to it that one working under him both heard and understood his warnings in due time to reach a place of reasonable safety. *Hercules Powder Co. v. Palmer*, 30 So. 2d 804 (Miss. 1947).

An employer who permitted a woman to lift heavy bundles without assistance when it knew that she was unequal to the task through its own physician who examined the woman after she complained of severe pain and who did not disclose her condition to her was negligent within the purview of this statute [Code 1942, § 1456]. *Blue Bell Globe Mfg. Co. v. Lewis*, 200 Miss. 685, 27 So. 2d 900 (1946).

A woman injured in the course of her employment which required that she lift heavy bundles did not assume the risk of that employment if she thought that she was physically fit, in spite of a previous hernia operation disclosed to her employer's physician on preemployment examination, and her fitness was approved by that physician. *Blue Bell Globe Mfg. Co. v. Lewis*, 200 Miss. 685, 27 So. 2d 900 (1946).

Continuation at work by a woman injured while lifting heavy bundles after requesting assistance and being denied in

words reasonably interpreted by a reasonable person as constituting a threat of discharge if she would not or could not lift the bundles without help did not constitute assumption of any risk of being strained. *Blue Bell Globe Mfg. Co. v. Lewis*, 200 Miss. 685, 27 So. 2d 900 (1946).

Although a servant assumes the ordinary risks inherent in his work, he does not assume the risk of his master's negligence in not furnishing sufficient help to do the work which the servant is employed to do in concert with others. *Herrin Motor Lines v. Jarvis*, 156 F.2d 276 (5th Cir. 1946).

Master was not liable for injuries sustained by "off-bearer" on band-saw when a slab pinned him against the frame of the saw, where the danger out of which the injury arose grew out of the work itself and not because of any defect in the place of work or the master's machine, even though the sawyer may have been negligent, since the "off-bearer" assumed the risk of the work. *Holliday v. Fulton Band Mill*, 142 F.2d 1006 (5th Cir. 1944).

Master is not responsible for negligence of a fellow servant unless the former has in truth appointed the latter to see after some one of the master's absolute duties and the servant has failed therein. *Holliday v. Fulton Band Mill*, 142 F.2d 1006 (5th Cir. 1944).

Work around a band-saw mill is not so dangerous and complex as to require the making and enforcement of special rules by the master so as to render it reasonably safe. *Holliday v. Fulton Band Mill*, 142 F.2d 1006 (5th Cir. 1944).

Servant assumes the ordinary risks of the work he has undertaken, including the risk that his fellow servant may not always be careful. *Holliday v. Fulton Band Mill*, 142 F.2d 1006 (5th Cir. 1944).

This section [Code 1942, § 1456] deals alone with risks caused by the negligence of the master, not risks incident to the employment. *Meridian Laundry Co. v. James*, 190 Miss. 119, 195 So. 689 (1940).

Injury sustained by laundry employee in charge of linen room allegedly from lifting twelve pound packages of linen to a shelf about five feet high was not the result of the employer's negligence, but was the result of the assumed hazards of

the employment as to which this section [Code 1942, § 1456] has no application, and the employer's superintendent was justified in telling the employee, upon her complaint, that if she did not want to place the packages on such shelf, she could quit. *Meridian Laundry Co. v. James*, 190 Miss. 119, 195 So. 689 (1940).

A direction by a section foreman to an employee to do the work in which the injury occurred in which the foreman told him that he would lose his job if he did not do what he was told to do, relieved the employee from any assumption of the risk. *Goss v. Kurn*, 187 Miss. 679, 193 So. 783 (1940).

Where an employee sustained injury while engaged with others in loading a box car with fertilizer, by reason of his loaded "buggy" being struck by that of another employee, such employee did not assume the risk, nor was the negligence of the fellow-servant chargeable to him, in view of the employer's negligence in ordering the particular work to be done in an unsafe and negligent manner and in depriving the servant of the only means known to him to protect himself from injury, the employer having ordered the employees to discontinue their method of having unloaded "buggy" wait until loaded "buggy" was placed in the car. *Jefferson v. Virginia-Carolina Chem. Co.*, 184 Miss. 23, 185 So. 230 (1938).

Where there was evidence showing that the falling beam which had injured an employee had fallen the week before from the same hoist, such employee did not assume the risk incident to its continued operation, if the employer was negligent in requiring its use. *Aponaug Mfg. Co. v. Carroll*, 183 Miss. 793, 184 So. 63 (1938).

That employee voluntarily assisted in lifting mat did not preclude recovery for employer's negligence in not furnishing sufficient number of employees to move mat. *Hardaway Contracting Co. v. Rivers*, 181 Miss. 727, 180 So. 800 (1938).

Bridge builder's employee, injured in fall from temporary bridge consisting of parallel stringers, did not, by using that undecked bridge, assume risk incident to its use, since servant assumes only dangers incident to service remaining after master has exercised reasonable care for

servant's safety and does not assume risk of master's negligence in not furnishing reasonably safe place to work. *Stricklin v. Harvey*, 181 Miss. 606, 179 So. 345 (1938).

Risk assumed by servant is danger incident to service which remains after master has exercised reasonable care for safety of servants. *Gow Co. v. Hunter*, 175 Miss. 896, 168 So. 264 (1936).

Servant, who was ordered to catch and hold heavy machine which was being moved up embankment to ledge cut therein 25 or 30 feet above road level when block and tackle holding machine was released and machine slipped down, held not to have voluntarily assumed risk of injury therefrom, since he was then confronted with emergency with no time for thought or deliberation. *Gow Co. v. Hunter*, 175 Miss. 896, 168 So. 264 (1936).

Employee held not precluded from recovering for injuries sustained when he was caused to fall thirty feet from trestle because of defect in rail over which hand car was being operated, on ground of assumption of risk. *Randolph Lumber Co. v. Minchew*, 172 Miss. 535, 159 So. 849 (1935).

One operating cotton gin did not assume risk increased by employer's negligence. *Mississippi Power & Light Co. v. Smith*, 169 Miss. 447, 153 So. 376 (1934).

Employee at gasoline service station held not to have assumed risk of injury from stumbling over exposed air pipe. *Standard Oil Co. v. Franks*, 167 Miss. 282, 149 So. 798 (1933).

Employee held not to assume risk of injury resulting from overexertion, when foreman, on threat of discharge, ordered him to do work alone, for which assistance was needed, since injury resulted from foreman's negligence. *Goodyear Yellow Pine Co. v. Mitchell*, 168 Miss. 152, 149 So. 792 (1933), error overruled, 168 Miss. 160, 150 So. 810 (1933).

Employee, not under duty of inspecting machinery operated by him to see whether it is safe, does not assume risk of master's negligence; employee, not under duty of inspecting machinery operated by him, does not assume risk of negligence of another employee, whose duty it is to inspect. *Planters' Oil Mill v. Wiley*, 154 Miss. 113, 122 So. 365 (1929).

3. Simple tool doctrine.

In action against employer for injuries sustained by employee while holding a short chisel which was being struck with heavy maul by helper, on ground that chisel, which foreman negligently required employee to use, was dangerous tool, employer was not entitled to directed verdict on ground that chisel and maul were simple tools and that employee assumed risk, since under statute servant does not assume risk where master is negligent. *J.J. Newman Lumber Co. v. Cameron*, 179 Miss. 217, 174 So. 571 (1937).

The master is not relieved of liability for injury from use of unsafe tools, though servant may have been as competent as master to determine suitability thereof for performance of required work, where servant is bound to obey order or subject himself to discipline for insubordination, since statute abolishes doctrine of assumption of risk when master is negligent. *J.J. Newman Lumber Co. v. Cameron*, 179 Miss. 217, 174 So. 571 (1937).

An automobile is not such a simple piece of machinery as to free the master from liability, but is a machine which the master must keep in a reasonable condition of safety, and this duty is nondelegable. *Mississippi Utils. Co. v. Smith*, 166 Miss. 105, 145 So. 896 (1933).

The abolition of the doctrine of assumption of risk by employees does not affect the simple tool doctrine. *Middleton v. National Box Co.*, 38 F.2d 89 (D.C. 1930); *Jones v. Southern United Ice Co.*, 167 Miss. 886, 150 So. 652 (1933).

4. Conductors and engineers.

Engineer, directed against own judgment to clean locomotive with defective hose, held not to have assumed risk, statute not applying. *Hercules Powder Co. v. Tyrone*, 155 Miss. 75, 124 So. 74 (1929), error overruled, 155 Miss. 90, 124 So. 475 (1929).

Comparative knowledge doctrine is unavailing where servant's injury resulted from master's negligence. *Hercules Powder Co. v. Tyrone*, 155 Miss. 75, 124 So. 74 (1929), error overruled, 155 Miss. 90, 124 So. 475 (1929).

It is only where the conductor or engineer voluntarily operates an unsafe engine or cars that they assume the risk of the employment. *Durr v. Homochitto Lumber Co.*, 137 Miss. 442, 102 So. 257 (1924).

This section [Code 1942, § 1456] does not prevent an engineer while repairing an engine from claiming damages from injury caused by the fireman putting the engine in motion against the orders of the engineer. *Homochitto Lumber Co. v. Albritton*, 132 Miss. 405, 96 So. 403 (1923).

5. Knowledge of danger or defect, effect of.

The doctrine of assumption of risk has been abolished only as between master and servant in certain places and where there is a relationship between a bailor and a bailee, the bailee cannot recover for injuries resulting from a defect of which the bailee knew and continued to use the defective machine after knowledge of defect. *Runnels v. Dixie Drive-It-Yourself Sys. Jackson Co.*, 220 Miss. 678, 71 So. 2d 453, 46 A.L.R.2d 397 (1954).

It was the duty of an employer to instruct an inexperienced seventeen-year-old boy in the operation of a rip saw. *Bonelli v. Flowers*, 203 Miss. 843, 33 So. 2d 455 (1948).

Sawmill company's employee, operating gasoline motorcar on such company's railroad with full knowledge of defective condition of horn and brakes, assumed risk of injury in resulting collision with school bus at highway crossing. *Eastman, Gardiner & Co. v. Caldwell*, 177 Miss. 861, 172 So. 126 (1937).

Driver did not assume risk of driving truck with knowledge of defect in steering wheel, especially when his employer through its agent had promised to repair. *Texas Co. v. Jackson*, 174 Miss. 737, 165 So. 546 (1936).

Experienced sawmill employee knowing and appreciating danger incident to running saw assumed consequences resulting from his own reckless act when he voluntarily placed his hand in position to be thrown into saw. *Eastman Gardiner Hardwood Co. v. Chatham*, 168 Miss. 471, 151 So. 556 (1934).

Foreman's order to employee running saw to keep trash out of rollers and keep mill moving was not order not to stop mill to remove trash, making employer liable for injuries to employee when he placed his hand in position to be thrown into saw. *Eastman Gardiner Hardwood Co. v. Chatham*, 168 Miss. 471, 151 So. 556 (1934).

Employee held not to have assumed risk of injury from cranking employer's truck, where he relied upon employer's promise to have truck repaired. *Mississippi Utils. Co. v. Smith*, 166 Miss. 105, 145 So. 896 (1933).

6. Questions for jury.

Assumption of the risk is a jury question in all but the clearest cases. *McMillan v. McMillan*, 262 So. 2d 781 (Miss. 1972).

Question of employer's negligence is for jury where employee was working on an unsafe scaffold, the condition of which was called to the attention of the foreman. *Ingalls Shipbuilding Corp. v. Trehern*, 155 F.2d 202 (5th Cir. 1946).

In an action against an electric power company for the death of one of its linemen, electrocuted when he came in contact with a high voltage wire while engaged in work on a pole, whether the company was negligent or the lineman was negligent in failing to cut off the power or insulate the wire with a rubber blanket, proximately causing the injury, was for the jury to determine. *Mississippi Power & Light Co. v. Merritt*, 194 Miss. 794, 12 So. 2d 527 (1943).

Where an employee was injured in consequence of lifting a bundle of steel rods while in an awkward posture which he had assumed by direction of his foreman, the question of the employer's negligence, the risk of which under the statute [Code 1942, § 1456] the employee does not assume, is for the jury. *Pittman v. Schultz*, 125 F.2d 82 (5th Cir. 1942).

In action by an employee against his employer for injuries sustained by reason of an explosion resulting from the use of gasoline in starting a fire for the purpose of heating grease guns and warming the employees in connection with the construction of a highway, questions with respect to the employer's duty to furnish a reasonably safe place for its employees to work, reasonably safe instrumentalities to

work with, and reasonably safe methods and rules under which to work were for the jury. *Curry & Turner Constr. Co. v. Bryan*, 184 Miss. 44, 185 So. 256 (1939).

Question of master's liability for injuries to servant, received when servant obeyed order of foreman to catch and hold heavy machine being pulled to ledge cut in embankment 25 or 30 feet above level of roadway when block and tackle holding machine was released, held for jury. *Gow Co. v. Hunter*, 175 Miss. 896, 168 So. 264 (1936).

7. Instructions.

In an action against a contractor by his laborer for injuries sustained during the construction of a chicken house when the contractor backed a truck into the laborer, and instruction that if the jury should find that the plaintiff laborer voluntarily and knowingly placed himself in a position of danger, then the plaintiff assumed the risk of injury and could not recover, was properly refused because the doctrine of assumption of the risk is not in force as

between a master and servant. *Smith v. Jones*, 220 So. 2d 829 (Miss. 1969).

Where evidence disclosed that injury resulted from negligence of fellow servants brought about by the direct order of the foreman, instructions eliminating entirely the question of whether the negligent order of the foreman was either the proximate cause or a contributing cause to the accident and injury, and tending to mislead the jury to apply the doctrine of assumption of risk, and to use contributory negligence as a complete bar to the action, were erroneous. *Oakes v. Mohon*, 208 Miss. 478, 44 So. 2d 551 (1950).

In action against truck owner for death of truck driver caused by flat tire, refusal of instruction that owner was not liable if driver was fully aware of defect in tire and of danger therefrom, was not error under statute abolishing doctrine of assumption of risk, where there was no evidence to warrant such instruction. *Crosby Lumber & Mfg. Co. v. Durham*, 181 Miss. 559, 179 So. 285 (1938), error overruled, 181 Miss. 573, 179 So. 854 (1938).

RESEARCH REFERENCES

ALR. Defenses of fellow servant and assumption of risk in actions involving injury or death of member of airplane crew, ground crew or mechanic. 13 A.L.R.2d 1137.

Failure to furnish assistance to employee as affecting liability for injury or death. 36 A.L.R.2d 8.

Duty and liability of employer to domestic servant for personal injury or death. 49 A.L.R.2d 317.

Necessity and manner of pleading assumption of risk as defense. 59 A.L.R.2d 239.

Failure to warn servant of disease or physical condition disclosed by medical examination. 69 A.L.R.2d 1213.

Applicability of state employers' liability act to action for death caused by maritime tort within a state's territorial waters. 71 A.L.R.2d 1304.

Hammer as simple tool within simple tool doctrine. 81 A.L.R.2d 965.

Distinction between assumption of risk and contributory negligence. 82 A.L.R.2d 1218.

State or local governmental unit's liability for injury to private highway construction worker based on its own negligence. 29 A.L.R.4th 1188.

When is death "instantaneous" for purposes of wrongful death or survival action. 75 A.L.R.4th 151.

Presumption or inference that accidental death of employee engaged in occupation of manufacturing or processing arose out of and in course of employment. 47 A.L.R.5th 801.

Am Jur. 27 Am. Jur. 2d, Employment Relationship §§ 361-390.

57B Am. Jur. 2d, Negligence §§ 804 et seq.

20 Am. Jur. Proof of Facts 2d 667, Contributory Negligence of Passenger Accepting Ride With Driver Suffering from Drowsiness, Illness, or Physical Defects.

40 Am. Jur. Proof of Facts 2d 603, Employer's Tort Liability Under Dual Capacity Doctrine.

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65 C.J.S., Negligence §§ 360-364.

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§ 11-7-20. Privity unnecessary to maintain actions in negligence, strict liability or breach of warranty.

In all causes of action for personal injury or property damage or economic loss brought on account of negligence, strict liability or breach of warranty, including actions brought under the provisions of the Uniform Commercial Code, privity shall not be a requirement to maintain said action.

SOURCES: Laws, 1976, ch. 385, § 5, eff from and after passage (approved April 27, 1976).

JUDICIAL DECISIONS

1. In general.

In an action against a skilled nursing home facility on behalf of one of its patients for failure to protect him from a fire ant attack and for failure to provide adequate medical treatment after the attack, in which the plaintiff amended the complaint to add a pest control company on the basis that it owed a duty to the patient to discover and treat cracks and crevices, the lack of privity between the plaintiff and the pest control*company did not preclude the possibility of its liability for negligence. *Estate of Posey v. Centennial Health Care Props. Corp.*, 78 F. Supp. 2d 554 (N.D. Miss. 1999).

In legal malpractice actions based on an attorney's negligence in performing title work, there is no longer a requirement of an attorney-client relationship, but rather, the presence or absence of an attorney-client relationship is now merely one factor to be considered in determining the duty owed; an attorney performing title work will be liable to reasonably foreseeable persons who, for a proper business purpose, detrimentally rely on the attorney's title work and suffer a loss proximately caused by the attorney's negligence. *Century 21 Deep S. Properties, Ltd. v. Corson*, 612 So. 2d 359 (Miss. 1992).

The purchasers of a home were not barred from bringing a negligence action

against a pest control operator, even though a real estate agent engaged the operator's services and the purchasers had no contract with the operator, since § 11-7-20 removed the privity requirement for maintaining a negligence cause of action. However, the demise of the defense of privity removes only a formalistic barrier to recovery, and did not expose the pest control operator to liability to the whole world; the door opened by the demise of privity is limited by more realistic inquiries into foreseeability and detrimental reliance. *Hosford v. McKissack*, 589 So. 2d 108 (Miss. 1991).

In an action against a construction company for breach of implied warranties and negligent construction of a building, the trial court's granting of summary judgment based on lack of privity was improper; § 11-7-20 abolished the requirement of privity for maintaining an implied warranty or negligence action. *May v. Ralph L. Dickerson Constr. Corp.*, 560 So. 2d 729 (Miss. 1990).

Statutory rule in § 11-7-20 removes privity requirement in all cases; however, loss of privity defense in no way removes any other defense that might be enjoyed were privity defense still applicable. *Hicks v. Thomas*, 516 So. 2d 1344 (Miss. 1987).

Independent auditor is liable to reasonably foreseeable users of audit who re-

quest and receive financial statement from audited entity for proper business purpose, and who then detrimentally rely on financial statement, suffering loss proximately caused by auditor's negligence; this rule protects third parties who request, receive, and rely on financial statement, while it also protects auditor from unlimited number of potential users who might otherwise read financial statement once published; auditor, however, remains free to limit dissemination of his opinion through separate agreement with audited entity. *Touche Ross & Co. v. Commercial Union Ins. Co.*, 514 So. 2d 315 (Miss. 1987).

Lack of privity between buyer and manufacturer of motor home is no bar to cause of action arising under UCC § 2-314, because privity requirement was statutorily abolished in Mississippi Code Annotated

§ 11-7-20. *Hargett v. Midas Int'l Corp.*, 508 So. 2d 663 (Miss. 1987).

Heat pump manufacturer's attempt in its express limited warranty to limit its liability as to any implied warranty was invalid. *Fedders Corp. v. Boatright*, 493 So. 2d 301 (Miss. 1986).

Since § 11-7-20 removes privity as a requirement in all causes of action for personal injury, property damage, or economic loss brought on account of negligence, strict liability, or breach of warranty, it plainly carries the suggestion that the privity requirement has been removed in all cases, and thus, privity of contract between the builder and the purchaser of a permanent structure on real estate is no longer a prerequisite to a viable cause of action. *Keyes v. Guy Bailey Homes, Inc.*, 439 So. 2d 670 (Miss. 1983).

RESEARCH REFERENCES

ALR. Privity of contract as essential to recovery in negligence action against manufacturer or seller of product alleged to have caused injury. 74 A.L.R.2d 1111.

Privity of contract as essential to recovery in action based on theory other than negligence, against manufacturer or seller of product alleged to have caused injury. 75 A.L.R.2d 39.

Privity of contract as essential in action against remote manufacturer or distributor for defects in goods not causing injury to person or to other property. 16 A.L.R.3d 683.

Recovery for mental anguish or emotional distress, absent independent physical injury, consequent upon breach of contract in connection with sale of real property. 61 A.L.R.3d 922.

Causes of action governed by limitations period in UCC § 2-725. 49 A.L.R.5th 1.

Admissibility and effect of evidence of professional ethics rules in legal malpractice action. 50 A.L.R.5th 301.

Third-party beneficiaries of warranties under UCC § 52-318. 50 A.L.R.5th 327.

Am Jur. 17A Am. Jur. 2d, Contracts §§ 425, 426, 435 et seq.

40 Am. Jur. Proof of Facts 2d 603, Employer's Tort Liability Under Dual Capacity Doctrine.

CJS. 17A C.J.S., Contracts §§ 610 et seq.

Law Reviews. 1987 Mississippi Supreme Court Review, Corporate, contract and commercial law. 57 Miss. L. J. 467, August, 1987.

1982 Mississippi Supreme Court Review: Contract, Corporation and Commercial Law. 53 Miss L. J. 141, March 1983.

1983 Mississippi Supreme Court Review: Abolition of privity requirement in action against homebuilder. 54 Miss L. J. 99, March 1984.

Practice References. 1 Am Law Prod Liab 3d, Privity of Contract §§ 13:2, 3.

2 Am Law Prod Liab 3d, Basic Elements of Strict Liability Case § 16:53.

2 Am Law Prod Liab 3d, Privity of Contract §§ 21:38, 40.

3 Am Law Prod Liab 3d, Defects in Real Estate § 38:23.

§§ 11-7-21 through 11-7-27. Repealed.

Repealed by Laws, 1991, ch. 573, § 141, eff from and after July 1, 1991.

§ 11-7-21. [Codes, 1857, ch. 61, art. 43; 1871, § 671; 1880, § 1511; 1892, § 664; 1906, § 722; Hemingway's 1917, § 505; 1930, § 514; 1942, § 1457]

§ 11-7-23. [Codes, 1857, ch. 61, art. 44; 1871, § 672; 1880, § 1512; 1892, § 665; 1906, § 723; Hemingway's 1917, § 506; 1930, § 515; 1942, § 1458]

§ 11-7-25. [Codes, Hutchinson's 1848, ch. 58, art. 1 (47); 1857, ch. 61, art. 51; 1871, § 677; 1880, § 1515; 1892, § 666; 1906, § 724; Hemingway's 1917, § 507; 1930, § 516; 1942, § 1459]

§ 11-7-27. [Codes, Hutchinson's 1848, ch. 58, art. 1 (47); 1857, ch. 61, art. 50; 1871, § 678; 1880, § 1516; 1892, § 667; 1906, § 725; Hemingway's 1917, § 508; 1930, § 517; 1942, § 1460]

Editor's Note — Former § 11-7-21 pertained to objections to nonjoinder or misjoinder of a plaintiff.

Former § 11-7-23 pertained to objections to nonjoinder or misjoinder of a defendant.

Former § 11-7-25 pertained to death of a party or coparty when there were two or more plaintiffs or defendants.

Former § 11-7-27 provided that an action would not be abated by the death of a nominal plaintiff.

§ 11-7-29. Death of one defendant after judgment.

When judgment shall have been rendered against two or more persons, and any one or more of them shall die, such judgment shall survive against the representatives of the deceased parties and the survivor. A scire facias may issue against the survivor, jointly with the representatives of the deceased parties; and such judgment may be thereupon revived, and execution issued in like manner.

SOURCES: Codes, 1857, ch. 61, art. 52; 1871, § 680; 1880, § 1517; 1892, § 668; Laws, 1906, § 726; Hemingway's 1917, § 509; Laws, 1930, § 518; Laws, 1942, § 1461.

Cross References — Execution of judgment after death of party, see §§ 13-3-149, 13-3-151.

Rule relative to substitution upon death of party, see Miss. R. Civ. P. 25.

JUDICIAL DECISIONS

1. In general.

Where at the time the chancellor rendered his opinion the defendant was dead and the cause was not revived against the duly acting executor, the final decree and subsequent proceedings amount to a nullity, and the Supreme Court, having no jurisdiction, dismissed the appeal without

prejudice to any right of the appellee to revive the action. *Owen v. Abraham*, 233 Miss. 558, 102 So. 2d 372 (1958).

As to jurisdiction over defendant shown by the pleadings, see *J.J. Newman Lumbar Co. v. Scipp*, 128 Miss. 322, 91 So. 11 (1922).

RESEARCH REFERENCES

Am Jur. 46 Am. Jur. 2d, Judgments §§ 411, 416, 443, 476.

CJS. 49 C.J.S., Judgments §§ 640-650.

§§ 11-7-31 through 11-7-39. Repealed.

Repealed by Laws, 1991, ch. 573, § 141, eff from and after July 1, 1991.

§ 11-7-31. [Codes, 1880, § 1521; 1892, § 669; 1906, § 727; Hemingway's 1917, § 510; 1930, § 519; 1942, § 1462]

§ 11-7-33. [Codes, 1880, § 1522; 1892, § 670; 1906, § 728; Hemingway's 1917, § 511; 1930, § 520; 1942, § 1463]

§ 11-7-35. [Codes, Hutchinson's 1848, ch. 61, art. 1 (89); 1857, ch. 61, art. 78; 1871, § 577; 1880, § 1536; 1892, § 671; 1906, § 729; Hemingway's 1917, § 512; 1930, § 521; 1942, § 1464]

§ 11-7-36. [En Laws, 1974, ch. 315]

§ 11-7-37. [Codes, 1857, ch. 61, art. 87; 1871, § 578; 1880, § 1537; 1892, § 672; 1906, § 730; Hemingway's 1917, § 513; 1930, § 522, 1942, § 1465]

§ 11-7-39. [Codes, 1857, ch. 61, art. 89; 1880, § 1539; 1892, § 673; 1906, § 731; Hemingway's 1917, § 514; 1930, § 523; 1942, § 1466]

Editor's Note — Former § 11-7-31 provided that actions by or against certain public officers, trustees or commissioners would not abate on account of the change of the person occupying such position.

Former § 11-7-33 provided that the manner of commencing an action in the circuit court was by filing a declaration.

Former § 11-7-35 pertained to content of the declaration.

Former section 11-7-36 authorized the pleading of different grounds for relief in a single declaration.

Former § 11-7-37 pertained to a statement of venue in pleadings.

Former § 11-7-39 specified how names of unknown defendants should be stated.

§ 11-7-41. Defendants may be sued by initials in certain cases.

In actions on written instruments, the defendant may be sued by the initial letters or contraction of the Christian name, used by him in his signature to such writing.

SOURCES: Codes, 1857, ch. 61, art. 89; 1871, § 579; 1880, § 1539; 1892, § 674; Laws, 1906, § 732; Hemingway's 1917, § 515; Laws, 1930, § 524; Laws, 1942, § 1467.

RESEARCH REFERENCES

Am Jur. 59 Am. Jur. 2d, Parties §§ 15, 16, 18, 23. **CJS.** 67 C.J.S., Parties § 142.

§ 11-7-43. Averment that partners contracted by a name affixed to a writing is sufficient.

In actions against one or more of several partners, it shall be sufficient to declare that he or they made the contract or executed the writing sued on by the co-partnership name, or other signature affixed to such writing.

SOURCES: Codes, 1857, ch. 61, art. 89; 1880, § 1539; 1892, § 675; Laws, 1906, § 733; Hemingway's 1917, § 516; Laws, 1930, § 525; Laws, 1942, § 1468.

JUDICIAL DECISIONS

1. In general.

In action on notes brought against defendants as copartners, allegation that defendants were copartners by virtue of certain conveyance was unnecessary; it being sufficient to allege that defendants were copartners and executed notes by partnership name. *Enochs-Flowers, Ltd. v. Bank of Forest*, 172 Miss. 36, 157 So.

711 (1934), error overruled 172 Miss. 36, 159 So. 407.

The names of persons composing the firm should be set out in the pleadings. *Ivy v. Evans*, 132 Miss. 652, 97 So. 194 (1923).

Partners cannot sue or be sued by their partnership name. *Blackwell v. John Reid & Co.*, 41 Miss. 102 (1866).

RESEARCH REFERENCES

Am Jur. 59 Am. Jur. 2d, Parties § 56.

59A Am. Jur. 2d, Partnership §§ 236 et seq.

CJS. 67 C.J.S., Parties §§ 146, 147.

§§ 11-7-45 through 11-7-65. Repealed.

Repealed by Laws, 1991, ch. 573, § 141, eff from and after July 1, 1991.

§ 11-7-45. [Codes, Hutchinson's 1848, ch. 59, art. 1 (60); 1857, ch. 61, art. 90; 1871, § 580; 1880, § 1540; 1892, § 676; 1906, § 734; Hemingway's 1917, § 517; 1930, § 526; 1942, § 1469]

§ 11-7-47. [Codes, 1848, ch. 61, art. 1 (55); 1857, ch. 61, art. 91; 1871, § 581; 1880, § 1541; 1892, § 677; 1906, § 735; Hemingway's 1917, § 518; 1930, § 527; 1942, § 1470]

§ 11-7-49. [Codes, 1857, ch. 61, art. 79; 1871, § 584; 1880, § 1542; 1892, § 678; 1906, § 736; Hemingway's 1917, § 519; 1930, § 528; 1942, § 1471]

§ 11-7-51. [Codes, 1857, ch. 61, art. 80; 1871, § 583; 1880, § 1543; 1892, § 679; 1906, § 737; Hemingway's 1917, § 520; 1930, § 529; 1942, § 1472]

§ 11-7-53. [Codes, 1857, ch. 61, art. 85; 1871, § 589; 1880, § 1544; 1892, § 680; 1906, § 738; Hemingway's 1917, § 521; 1930, § 530; 1942, § 1473]

§ 11-7-55. [Codes, 1942, § 1474; Laws, 1942, ch. 304]

§ 11-7-57. [Codes, Hutchinson's 1848, ch. 61, art. 93; 1871, § 592; 1880, § 1546; 1892, § 681; 1906, § 739; Hemingway's 1917, § 522; 1930, § 531; 1942, § 1475]

§ 11-7-59. [Codes, 1942, § 1475.5; Laws, 1948, ch. 230, §§ 1-6; 1950, ch. 356, §§ 1, 2 (¶ 2)]

§ 11-7-61. [Codes, 1857, ch. 61, art. 96; 1871, § 598; 1880, § 1549; 1892, § 685; 1906, § 743; Hemingway's 1917, § 526; 1930, § 535; 1942, § 1479]

§ 11-7-63. [Codes, 1857, ch. 61, art. 98; 1871, § 601; 1880, § 1551; 1892, § 687; 1906, § 745; Hemingway's 1917, § 528; 1930, § 537; 1942, § 1481]

§ 11-7-65. [Codes, Hutchinson's 1848, ch. 59, art. 61; 1857, ch. 61, art. 101; 1871, § 604; 1880, § 1554; 1892, § 688; 1906, § 746; Hemingway's 1917, § 529; 1930, § 538; 1942, § 1482]

Editor's Note — Former § 11-7-45 required that a copy of the account or writing upon which the action is founded be filed with the declaration.

Former § 11-7-47 required that a copy of any writing of which proffer was to be made be annexed to or filed with the pleading.

Former § 11-7-49 required that in all actions on bonds with a condition, plaintiff state the condition and assign breaches thereof in his declaration.

Former § 11-7-51 required that in actions of trespass to land, the place of the alleged trespass be described.

Former § 11-7-53 provided that in actions for libel or slander, the plaintiff need only aver the defamatory sense of words or matter complained of, and that in certain cases, the declaration was sufficient.

Former § 11-7-55 pertained to amendment of declarations.

Former § 11-7-57 made all provisions in reference to declarations applicable to pleas of defendants and to all subsequent pleadings.

Former § 11-7-59 abolished pleas in the circuit court, and provided that defenses be set up by way of answer.

Former § 11-7-61 pertained to giving evidence of mitigating circumstances notwithstanding a plea of not guilty in certain actions.

Former § 11-7-63 pertained to pleading and setting off against demand by plaintiff debts or demands defendant had against plaintiff.

Former § 11-7-65 required defendant to file with his plea a statement of items or writings to be set off.

§ 11-7-67. Balance of mutual dealings on death of one party.

Where there shall have been mutual dealings between two or more persons, and one or more of them shall die before an adjustment of such dealings, the lawful demands of such parties against each other shall be a good payment, or setoff, to the amount thereof, notwithstanding the estate of one or more of such deceased persons shall be insolvent; and only the balance due shall be the debt.

SOURCES: Codes, Hutchinson's 1848, ch. 59, art. 10; 1857, ch. 61, art. 99; 1871, § 602; 1880, § 1552; 1892, § 689; Laws, 1906, § 747; Hemingway's 1917, § 530; Laws, 1930, § 539; Laws, 1942, § 1483.

Cross References — Rule relative to substitution upon death of party, see Miss. R. Civ. P. 25.

Rules providing that all claims be presented as claims, counterclaims, or cross-claims, see Miss. R. Civ. P. 8, 13.

JUDICIAL DECISIONS

1. In general.

The sale of a dairy farm and the subsequent shooting of the purchaser by the seller do not constitute mutual dealings as contemplated by this section [Code 1942, § 1483], for an unliquidated tort claim cannot be lawfully set off against certain promissory notes executed by the purchasers of the farm payable to the sellers and evidencing a portion of the purchase price. *Weaver v. Mason*, 228 So. 2d 591 (Miss. 1969).

In suit to set aside decree approving executor's account, balance actually due executor as an individual under personal account with testatrix should be ascertained pursuant to rule that entries in books of account are mere evidence of facts, and to statute requiring balance resulting from mutual dealings to be ascertained on death of one party. *Howell v. Ott*, 182 Miss. 252, 180 So. 52 (1938), error overruled, 182 Miss. 286, 181 So. 740 (1938).

An account distinct from mutual dealings with the parties must be probated against the estate of one dying. *Cohn v. Carter*, 92 Miss. 627, 46 So. 60 (1908).

A debt due by a deceased person cannot

be set off against a note given to the administrator for a part of the property sold by him. *Mellen v. Boarman*, 21 Miss. (13 S. & M.) 100 (1849); *Bales v. Hyman*, 57 Miss. 330 (1879).

§§ 11-7-69 and 11-7-71. Repealed.

Repealed by Laws, 1991, ch. 573, § 141, eff from and after July 1, 1991.

§ 11-7-69. [Codes, 1942, § 1483.5; Laws, 1952, ch. 249, §§ 1, 2]

§ 11-7-71. [Codes, Hutchinson's 1848, ch. 59, art. 58; 1857, ch. 61, art. 100; 1871, § 603; 1880, § 1553; 1892, § 690; 1906, § 748; Hemingway's 1917, § 531; 1930, § 540; 1942, § 1484]

Editor's Note — Former § 11-7-69 pertained to the pleading of counterclaims.

Former § 11-7-71 authorized the pleading of payments made at or after maturity.

§ 11-7-73. Disclaiming title and tendering of amends in action for trespass.

In actions in justice court for trespass on land, the defendant may plead that he disclaims any title or claim to the land in question, and that the trespass was involuntary or by negligence, and that he tendered or offered sufficient amends therefor before suit brought, and he shall thereupon bring the amount so tendered into court; and unless the plaintiff in such action shall recover more damage than the amount so tendered, he shall be adjudged to pay the costs of the action.

SOURCES: Codes, 1857, ch. 61, art. 104; 1871, § 607; 1880, § 1555; 1892, § 691; Laws, 1906, § 749; Hemingway's 1917, § 532; Laws, 1930, § 541; Laws, 1942, § 1485; Laws, 1991, ch. 573, § 20, eff from and after July 1, 1991.

Cross References — Acts constituting criminal trespass, generally, see §§ 97-17-79 et seq.

Rule governing the forms of denial and defenses, see Miss. R. Civ. P. 8.

RESEARCH REFERENCES

Am Jur. 75 *Am. Jur. 2d*, Trespass §§ 73-76. **CJS.** 87 *C.J.S.*, Trespass §§ 86-89.

§§ 11-7-75 through 11-7-105. Repealed.

Repealed by Laws, 1991, ch. 573, § 141, eff from and after July 1, 1991.

§ 11-7-75. [Codes, 1857, ch. 61, art. 106; 1871, § 609; 1880, § 1557; 1892, § 693; 1906, § 751; Hemingway's 1917, § 534; 1930, § 543; 1942, § 1487]

§ 11-7-77. [Codes, Hutchinson's 1848, ch. 58, art. 1 (72); 1857, ch. 61, art. 107; 1871, § 610; 1880, § 1559; 1892, § 695; 1906, § 753; Hemingway's 1917, § 536; 1930, § 545; 1942, § 1489]

§ 11-7-79. [Codes, Hutchinson's 1848, ch. 61, art. 1 (64); 1857, ch. 61, art. 108; 1871, § 611; 1880, § 1560; 1892, § 696; 1906, § 754; Hemingway's 1917, § 537; 1930, § 546; 1942, § 1490]

§ 11-7-81. [Codes, Hutchinson's 1848, ch. 61, art. 1 (65); 1857, ch. 61, art. 109; 1871, § 612; 1880, § 1561; 1892, § 697; 1906, § 755; Hemingway's 1917, § 538; 1930, § 547; 1942, § 1491]

§ 11-7-83. [Codes, Hutchinson's 1848, ch. 61, art. 1 (66); 1857, ch. 61, art. 110; 1871, § 613; 1880, § 1562; 1892, § 698; 1906, § 756; Hemingway's 1917, § 539; 1930, § 548; 1942, § 1492]

§ 11-7-85. [Codes, Hutchinson's 1848, ch. 61, art. 1 (65); 1857, ch. 61, art. 111; 1871, § 614; 1880, § 1563; 1892, § 699; 1906, § 757; Hemingway's 1917, § 540; 1930, § 549; 1942, § 1493]

§ 11-7-87. [Codes, 1857, ch. 61, art. 112; 1871, § 615; 1880, § 1564; 1892, § 700; 1906, § 758; Hemingway's 1917, § 541; 1930, § 550; 1942, § 1494]

§ 11-7-89. [Codes, 1857, ch. 61, art. 114; 1871, § 616; 1880, § 1565; 1892, § 701; 1906, § 759; Hemingway's 1917, § 542; 1930, § 551; 1942, § 1495]

§ 11-7-91. [Codes, 1857, ch. 61, art. 115; 1871, § 617; 1880, § 1566; 1892, § 702; 1906, § 760; Hemingway's 1917, § 543; 1930, § 552; 1942, § 1496]

§ 11-7-93. [Codes, 1857, ch. 61, art. 116; 1880, § 1567; 1892, § 703; 1906, § 761; Hemingway's 1917, § 544; 1930, § 553; 1942, § 1497]

§ 11-7-95. [Codes, 1857, ch. 61, art. 117; 1871, § 618; 1880, § 1568; 1892, § 704; 1906, § 762; Hemingway's 1917, § 545; 1930, § 554; 1942, § 1498]

§ 11-7-97. [Codes, 1892, § 705; 1906, § 763; Hemingway's 1917, § 546; 1930, § 555; 1942, § 1499]

§ 11-7-99. [Codes, 1857, ch. 61, art. 119; 1871, § 620; 1880, § 1569; 1892, § 706; 1906, § 764; Hemingway's 1917, § 547; 1930, § 556; 1942, § 1500]

§ 11-7-101. [Codes, 1857, ch. 61, art. 120; 1871, § 593; 1880, § 1570; 1892, § 707; 1906, § 765; Hemingway's 1917, § 548; 1930, § 557; 1942, § 1501]

§ 11-7-103. [Codes, 1857, ch. 61, art. 1871, § 595; 1880, § 1571; 1892, § 708; 1906, § 766; Hemingway's 1917, § 549; 1930, § 558; 1942, § 1502]

§ 11-7-105. [Codes, Hutchinson's 1848, ch. 61, art. 1 (79); 1857, ch. 61, art. 83; 1871, § 587; 1880, § 1572; 1892, § 709; 1906, § 767; Hemingway's 1917, § 550; 1930, § 559; 1942, § 1503]

Editor's Note — Former § 11-7-75 provided that whenever any pleading concluded to the county, issue would be considered joined thereon, unless demurrer thereto was filed.

Former § 11-7-77 pertained to the payment of costs when pleading was held to be insufficient.

Former § 11-7-79 pertained to assignment of causes when demurrer interposed.

Former § 11-7-81 pertained to judgment on overruling a demurrer to a declaration.

Former § 11-7-83 specified the judgment when a demurrer to a plea matter of the defendant is sustained.

Former § 11-7-85 authorized the court to refuse a frivolous demurrer.

Former § 11-7-87 stated that a joinder in demurrer was not required in any case.

Former § 11-7-89 stated that express color and special traverse were not required in any pleading.

Former § 11-7-91 required that a pleading be signed by the party or his attorney.

Former § 11-7-93 abolished special demurrers.

Former § 11-7-95 specified how the court could deal with obscure, irrelevant or redundant matters in pleadings.

Former § 11-7-97 pertained to bills of particulars.

Former § 11-7-99 authorized the omission of allegations that were not material or traversable.

Former § 11-7-101 provided that formal defense was not required in an answer.

Former § 11-7-103 provided that it was not necessary to use allegations of *actionem non* and of *precludi non*.

Former § 11-7-105 stated that if a private statute was pleaded, it was sufficient to refer to it by its title and the date of its passage.

§ 11-7-107. How private way may be pleaded.

A right by virtue of a private way may be pleaded generally in the same manner as if pleading a public way.

SOURCES: Codes, 1857, ch. 61, art. 84; 1871, § 588; 1880, § 1573; 1892, § 710; Laws, 1906, § 768; Hemingway's 1917, § 551; Laws, 1930, § 560; Laws, 1942, § 1504.

Cross References — Method of establishing private way, see § 65-7-201.

§§ 11-7-109 through 11-7-129. Repealed.

Repealed by Laws, 1991, ch. 573, § 141, eff from and after July 1, 1991.

§ 11-7-109. [Codes, 1857, ch. 61, art. 81; 1871, § 585; 1880, § 1574; 1892, § 711; 1906, § 769; Hemingway's 1917, § 552; 1930, § 561; 1942, § 1505]

§ 11-7-111. [Codes, 1857, ch. 61, art. 82; 1871, § 586; 1880, § 1575; 1892, § 712; 1906, § 770; Hemingway's 1917, § 553; 1930, § 562; 1942, § 1506]

§ 11-7-113. [Codes, 1857, ch. 61, art. 178; 1871, § 660; 1880, § 1577; 1892, § 713; 1906, § 771; Hemingway's 1917, § 554; 1930, § 563; 1942, § 1507]

§ 11-7-115. [Codes, Hutchinson's 1848, ch. 59, art. 1(91); 1857, ch. 61, art. 180; 1871, § 621; 1880, § 1581; 1892, § 717; 1906, § 775; Hemingway's 1917, § 558; 1930, § 567; 1942, § 1511]

§ 11-7-117. [Codes, 1857, ch. 61, art. 182; 1871, § 623; 1880, § 1582; 1892, § 718; 1906, § 776; Hemingway's 1917, § 559; 1930, § 568; 1942, § 1512]

§ 11-7-119. [Codes, Hutchinson's 1848, ch. 59, art. 1 (91); 1857, ch. 61, art. 183; 1871, § 624; 1880, § 1583; 1892, § 719; 1906, § 777; Hemingway's 1917, § 560; 1930, § 569; 1942, § 1513]

§ 11-7-121. [Codes, 1857, ch. 61, art. 150; 1871, § 631; 1880, § 1703; 1892, § 722; 1906, § 783; Hemingway's 1917, § 566; 1930, § 575; 1942, § 1519; Laws, 1904, ch. 142; 1948, ch. 229; 1962, ch. 297]

§ 11-7-123. [Codes, 1857, ch. 61, art. 151; 1871, § 633; 1880, § 1704; 1892, § 723; 1906, § 784; Hemingway's 1917, § 567; 1930, § 576; 1942, § 1520]

§ 11-7-125. [Codes, Hutchinson's 1848, ch. 61, art. 1 (77); 1857, ch. 61, art. 159; 1871, § 641; 1880, § 1721; 1892, § 740; 1906, § 802; Hemingway's 1917, § 590; 1930, § 594; 1942, § 1538]

§ 11-7-127. [Codes, 1857, ch. 61, art. 160; 1871, § 642; 1880, § 1722; 1892, § 741; 1906, § 803; Hemingway's 1917, § 591; 1930, § 595; 1942, § 1539]

§ 11-7-129. [Codes, 1857, ch. 61, art. 167; 1871, § 649; 1880, § 1705; 1892, § 724; 1906, § 785; Hemingway's 1917, § 568; 1930, § 577; 1942, § 1521]

Editor's Note — Former § 11-7-109 specified how to plead the performance of conditions precedent.

Former § 11-7-111 specified how to plead a judgment or other determination of a court.

Former § 11-7-113 pertained to defendant's offer and payment of compensation or amends before trial.

Former § 11-7-115 authorized the court to allow amendments to be made to pleadings at any time before verdict.

Former § 11-7-117 specified what variance between allegations and proof were deemed material.

Former § 11-7-119 pertained to the effect of one faulty count out of several counts.

Former § 11-7-121 pertained to when a defendant should plead, when pleas would be tried, and judgments by default.

Former § 11-7-123 pertained to affidavits for continuance.

Former § 11-7-125 provided that every plaintiff desiring to suffer a nonsuit on a trial would be barred therefrom unless he did so before the jury retired to consider the verdict.

Former § 11-7-127 pertained to the plaintiff suffering a nonsuit before the clerk in vacation.

Former § 11-7-129 authorized the parties to waive trial by jury to an issue of fact in actions on contract.

§ 11-7-131. Cases may be taken under judicial advisement.

The judge may take a case under advisement until the next term. If an issue of fact be involved, before taking it under advisement, he shall, on notice to each party, cause the evidence on both sides to be reduced to writing and signed by him. At the next term, the judge shall deliver his opinion in writing, and the evidence and opinion shall be a part of the record without a bill of exceptions. Either party prosecuting an appeal may avail himself of all questions arising upon the record.

SOURCES: Codes, Hutchinson's 1848, ch. 53, art. 6 (13); 1857, ch. 61, art. 10; 1871, § 534; 1880, § 1707; 1892, § 725; Laws, 1906, § 786; Hemingway's 1917, § 569; Laws, 1930, § 578; Laws, 1942, § 1522.

Cross References — Chancery proceedings in vacation, see § 9-5-105.

JUDICIAL DECISIONS

1. In general.

There has been a vast expansion by statutory enactment of the times within which circuit judges are lawfully empowered to conduct court affairs. Although the Mississippi Constitution contemplates circuit courts being held at fixed, stated terms provided by statute, and the circuit courts of this State have had fixed terms, the legislature by various enactments-

§§ 11-1-7, 11-7-131 to 133, 11-7-121, 11-1-16, and 9-7-3-has granted circuit courts wide latitude in taking official actions in vacation. [11-1-7, 11-7-133 and 11-7-121 were repealed] Griffin v. State, 565 So. 2d 545 (Miss. 1990).

Where a circuit judge took under advisement the plaintiffs' motion for leave to amend their declaration and it was not overruled until the next succeeding term

of court had passed, the plaintiffs' right to appeal from the court's order to the Supreme Court remained, for until the order of dismissal was entered no statute of limitations ran against the parties' right to appeal under Code 1942, § 753. *McGill v. City of Laurel*, 252 Miss. 765, 168 So. 2d 50 (1964).

Where a motion to set aside a judgment for a certain sum is continued and overruled at a subsequent term but the judgment allowed to stand for a less sum, a judgment recovered and enrolled during the interval is prior in lien. *Crane v. Richardson*, 73 Miss. 254, 18 So. 542 (1895).

Motion for a new trial cannot be kept under advisement longer than the term next succeeding. The section [Code 1942, § 1522] does not apply to motions for new trials as to taking under advisement. *Scarborough v. Smith*, 52 Miss. 517 (1876); *Ross v. Garey*, 8 Miss. (7 Howard) 47 (1843); *Luther v. Borden*, 48 U.S. 1, 12 L. Ed. 581 (1849); *Kane v. Burrus*, 10 Miss. (2 S. & M.) 313 (1844); *McClure v. Houston*, 18 Miss. (10 S. & M.) 392 (1848); *Coopwood v. Prewett*, 30 Miss. 206 (1855); *Hudson v. Strickland*, 49 Miss. 591 (1873).

§ 11-7-133. Repealed.

Repealed by Laws, 1991, ch. 573, § 141, eff from and after July 1, 1991.

[Codes, Hemingway's 1917, § 570; 1930, § 579; 1942, § 1523; Laws, 1912, ch. 158]

Editor's Note — Former § 11-7-133 authorized circuit court judges to decide cases in vacation, and, with consent of the parties, try cases in vacation.

§ 11-7-135. Exceptions in trials by court — either party may appeal.

In cases tried by the court, either party may take bills of exception, and have an appeal, as in case of trial by jury.

SOURCES: Codes, 1857, ch. 61, art. 169; 1871, § 651; 1880, § 1706; 1892, § 726; Laws, 1906, § 787; Hemingway's 1917, § 571; Laws, 1930, § 580; Laws, 1942, § 1524.

JUDICIAL DECISIONS

1. In general.

Where a minor and his parents were represented by counsel in a youth court, and counsel could have prepared and sent up on appeal a bill of exceptions reflecting proceedings or facts which transpired in that court but did not do so, the Supreme Court in deciding the appeal could con-

sider only such record as was properly before it. In *re Simpson*, 199 So. 2d 833 (Miss. 1967).

In such case a motion for a new trial is not contemplated by the statute; the bill of exceptions must be taken to the judgment. *Quin v. Myles*, 59 Miss. 375 (1882).

RESEARCH REFERENCES

Am Jur. 5 Am. Jur. 2d, Appeal and Error §§ 730-733, 875.

CJS. 4 C.J.S., Appeal and Error § 222.

§§ 11-7-137 through 11-7-145. Repealed.

Repealed by Laws, 1991, ch. 573, § 141, eff from and after July 1, 1991.

§ 11-7-137. [Codes, 1857, ch. 61, art. 170; 1871, § 652; 1880, § 1723; 1892, § 742; 1906, § 804; Hemingway's 1917, § 592; 1930, § 596; 1942, § 1540]

§ 11-7-139. [Codes, 1857, ch. 61, art. 171; 1871, § 653; 1880, § 1724; 1892, § 743; 1906, § 805; Hemingway's 1917, § 593; 1930, § 597; 1942, § 1541]

§ 11-7-141. [Codes, 1857, ch. 61, art. 172; 1871, § 654; 1880, § 1725; 1892, § 744; 1906, § 806; Hemingway's 1917, § 594; 1930, § 598; 1942, § 1542]

§ 11-7-143. [Codes, 1857, ch. 61, art. 173; 1871, § 655; 1880, § 1726; 1892, § 745; 1906, § 807; Hemingway's 1917, § 595; 1930, § 599; 1942, § 1543]

§ 11-7-145. [Codes, Hutchinson's 1848, ch. 61, art. 1 (142); 1857, ch. 61, art. 152; 1871, § 634; 1880, § 1708; 1892, § 727; 1906, § 788; Hemingway's 1917, § 572; 1930, § 581; 1942, § 1525; Am Laws, 1984 ch. 415, § 1]

Editor's Note — Former § 11-7-137 authorized the referral of all issues in an action to referees.

Former § 11-7-139 authorized the referral to referees of all cases in which matters of account were in controversy.

Former § 11-7-141 authorized either party to file exceptions to the report of a referee.

Former § 11-7-143 specified the powers of the referee.

Former § 11-7-145 pertained to peremptory challenges in civil suits.

§ 11-7-147. Opening statements allowed.

Before the introduction of the evidence, the plaintiff may briefly state his case orally to the jury, and the evidence by which he expects to sustain it. Then the defendant may briefly state his case, and the evidence by which he expects to support it.

SOURCES: Codes, 1892, § 728; Laws, 1906, § 789; Hemingway's 1917, § 573; Laws, 1930, § 582; Laws, 1942, § 1526.

Cross References — Number of counsel to be heard in criminal case, see § 99-17-11.

JUDICIAL DECISIONS**1. In general.**

After the district attorney stated that the prosecution did not desire to make an opening statement, the trial court did not err in postponing defendant's opening statement until immediately before he presented his evidence, where there was no showing of manifest abuse of discretion or that substantial prejudice resulted. *Black v. State*, 308 So. 2d 79 (Miss. 1975).

Inasmuch as testimony of witness as to earlier occasion when television antenna fell on power lines causing damage was admissible, plaintiff's attorney in a wrongful death action resulting from electrocution had a right to mention it in his preliminary statement to the jury. *Mississippi Power & Light Co. v. Shepard*, 285 So. 2d 725, 82 A.L.R.3d 86 (Miss. 1973).

RESEARCH REFERENCES

ALR. Propriety of trial court order limiting time for opening or closing argument in civil case-state cases. 71 A.L.R.4th 130.

Propriety of trial court order limiting time for opening or closing argument in criminal case-state cases. 71 A.L.R.4th 200.

Am Jur. 75A Am. Jur. 2d, Trial §§ 513-529.

CJS. 88 C.J.S., Trial §§ 263-275.

Practice References. Young, Trial Handbook for Mississippi Lawyers § 7:1.

§ 11-7-149. Court officers not to converse with jurors.

The sheriff, bailiff, or other officer, shall not be in the room or converse with a juror after the jury has retired from the bar, save by order of the court. A violation of this section shall subject the offender to a fine of fifty dollars and one week's imprisonment for a contempt.

SOURCES: Codes, Hutchinson's 1848, ch. 61, art. 1 (137); 1857, ch. 61, art. 156; 1871, § 638; 1880, § 1711; 1892, § 729; Laws, 1906, § 790; Hemingway's 1917, § 574; Laws, 1930, § 583; Laws, 1942, § 1527.

Cross References — Control of jurors by court, see § 13-5-83.

View of place by jury, see § 13-5-91.

Another section derived from same 1942 code section, see § 97-9-57.

Provision that jurors must avoid all contacts with lawyers, litigants, witnesses, or spectators, see Uniform Circuit Court Rule 3.10.

JUDICIAL DECISIONS

1. In general.

In prosecution for manslaughter when jury during deliberations asked the bailiff what the penalty was for manslaughter and the bailiff replied that penalty was from one month to ten years, and the jury subsequently found defendant guilty of

manslaughter and recommended that accused be given mercy of the court, such communication affected the integrity of the verdict and required reversal of conviction. *Horn v. State*, 216 Miss. 439, 62 So. 2d 560 (1953).

RESEARCH REFERENCES

ALR. Prejudicial effect, in criminal case, of communication between court officials or attendants and jurors. 41 A.L.R.2d 227.

Prejudicial effect, in civil case, of communications between court officials or attendants and jurors. 41 A.L.R.2d 288.

Am Jur. 75B Am. Jur. 2d, Trial § 1568. 24 Am. Jur. Proof of Facts 2d 633, Jury Misconduct Warranting New Trial.

CJS. 89 C.J.S., Trial §§ 782-789.

Practice References. Young, Trial Handbook for Mississippi Lawyers §§ 35:3, 35:12.

§ 11-7-151. Trial — jury may take evidence to jury room.

All papers read in evidence on the trial of any cause may be carried from the bar by the jury.

SOURCES: Codes, Hutchinson's 1848, ch. 61, art. 1 (80); 1857, ch. 61, art. 157; 1871, § 639; 1880, § 1712; 1892, § 730; Laws, 1906, § 791; Hemingway's 1917, § 575; Laws, 1930, § 584; Laws, 1942, § 1528.

Cross References — Another section derived from same 1942 code section, see § 99-17-37.

Provision to effect that pleadings shall not be carried into jury room, except insofar as pleading or portion thereof has been admitted in evidence, see Miss. R. Civ. P. 8.

JUDICIAL DECISIONS

1. In general.

Although it is a better practice that exhibits be withheld from the jury room until the jury retires for a verdict, there was no prejudice or error in permitting the jury to carry the exhibits into the jury room following the plaintiff's case in chief and prior to submitting it for a verdict where the exhibits included those submitted by both the plaintiff and the defendant. Huey v. Port Gibson Bank, 390 So. 2d 1005 (Miss. 1980).

Where map was paper read in evidence in arson prosecution, permitting jury to take map to jury room when they retire to consider verdict held not error. Whittaker v. State, 169 Miss. 517, 142 So. 474 (1932).

The court should not cause to be withheld from the jury any papers read in evidence on the trial. Lipscomb v. State, 75 Miss. 559, 23 So. 210 (1898).

RESEARCH REFERENCES

ALR. Prejudicial effect of jury's procurement or use of book during deliberations in civil cases. 31 A.L.R.4th 623.

Am Jur. 75B Am. Jur. 2d, Trial §§ 1665, 1676 et seq.

CJS. 89 C.J.S., Trial §§ 803-808.

Practice References. Young, Trial Handbook for Mississippi Lawyers §§ 30:4, 35:6.

§ 11-7-153. Repealed.

Repealed by Laws, 1991, ch. 573, § 141, eff from and after July 1, 1991.

[Codes, Hutchinson's 1848, ch. 61, art. 1 (80); 1857, ch. 61, art. 158; 1871, § 640; 1880, § 1713; 1892, § 731; 1906, § 792; Hemingway's 1917, § 576; 1930, § 585; 1942, § 1529]

Editor's Note — Former § 11-7-153 provided that interpreters could be sworn truly to interpret, when necessary.

§ 11-7-155. Judge not to sum up or comment on testimony or charge jury.

The judge in any civil cause shall not sum up or comment on the testimony, or charge the jury as to the weight of evidence.

SOURCES: Codes, Hutchinson's 1848, ch. 61, art. 1 (144); 1857, ch. 61, art. 161; 1871, § 643; 1880, § 1714; 1892, § 732; Laws, 1906, § 793; Hemingway's 1917, § 577; Laws, 1930, § 586; Laws, 1942, § 1530; Laws, 1991, ch. 573, § 21, eff from and after July 1, 1991.

Cross References — Instructions in chancery court, see § 11-5-3.

Instructions in county court, see § 11-9-1.

Instruction on number of jurors to agree on verdict in civil case, see § 13-5-93.

Another section derived from same 1942 code section, see § 99-17-35.

Jury instructions in criminal cases, see § 99-17-35.

Procedural provisions with respect to filing of requested instructions, see Uniform Circuit Court Rules 2.10 and 3.09.

Rule covering jury instructions, see Miss. R. Civ. P. 51.

JUDICIAL DECISIONS

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2. Marking and filing instructions.
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20. Subject matter of instructions.
21. —Credibility of witnesses.
22. —Negligence, generally.
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25. —Assumption of risk.
26. —Sudden emergency.
27. —Damages; amount of recovery.
28. —Punitive damages.
29. —Instructions on statute.
30. —Miscellaneous.
31. Objections and exceptions.
32. Review.

1. In general.

This section contravenes the constitutional mandate imposed upon the judiciary for the fair administration of justice insofar as the phrase "at the request of either party" prohibits a judge from in-

structing a jury as to the applicable law of the case; this section shall be applied with the indicated unconstitutional phrase deleted; the trial judge may initiate and give appropriate written instructions in addition to the approved instructions submitted by the litigants if he deems the ends of justice so require, but the trial judge shall not be put in error for his failure to instruct on any point of law unless specifically requested in writing to do so. *Newell v. State*, 308 So. 2d 71 (Miss. 1975).

A judge may instruct the jury on a point only when requested. *Ouille v. Saliba*, 246 Miss. 365, 149 So. 2d 468 (1963).

The circuit judge cannot originate instructions or give them on his own motion. *Gangloff v. State*, 232 Miss. 395, 99 So. 2d 461 (1958).

A trial judge may not testify as a witness upon the merits of the controversy, especially where the trial is by jury and there is only one judge presiding, the functions of judge and witness being incompatible. *Brashier v. State*, 197 Miss. 237, 20 So. 2d 65, 157 A.L.R. 311 (1944).

If a judge has notice that he will be called as a witness, he should arrange for someone to try the case, and if he has not sufficient notice to make such arrangement, then he should refuse to testify as a witness in the case. *Brashier v. State*, 197 Miss. 237, 20 So. 2d 65, 157 A.L.R. 311 (1944).

Failure to object in advance to the trial judge's testifying as a witness will not preclude appellate review of the propriety of such procedure where immediately thereafter counsel moved that the evidence be stricken and, if not, for a mistrial. *Brashier v. State*, 197 Miss. 237, 20 So. 2d 65, 157 A.L.R. 311 (1944).

Statute prohibiting judge to charge law except upon written request of party was

not intended to transfer power to instruct jurors as to the law to any person other than trial judge. *Dement v. Summer*, 175 Miss. 290, 165 So. 791 (1936), overruled, *Newell v. State*, 308 So. 2d 71 (Miss. 1975).

Circuit judge cannot instruct jury of his own motion, but only when written requests are made. *Masonite Corp. v. Lochridge*, 163 Miss. 364, 140 So. 223 (1932).

Construction of statute, subsequently re-enacted, as prohibiting judges from instructing juries without written requests, will not be departed from. *Masonite Corp. v. Lochridge*, 163 Miss. 364, 140 So. 223 (1932).

Courts have the right and should limit the number of instructions, but this is not an arbitrary discretion as instructions should be granted to cover all necessary phases of the case. *Yazoo & Miss. V. Ry. v. Dees*, 121 Miss. 439, 83 So. 613 (1920).

The presiding judge is the source from which the law touching the case is to be supplied and he cannot of his own motion give any instruction whatever. Those given must be in writing and at the request of the party. *Bangs v. State*, 61 Miss. 363 (1883).

A circuit judge is denied the power of originating instructions not called for or rendered necessary by those required by counsel. *Watkins v. State*, 60 Miss. 323 (1882).

2. Marking and filing instructions.

Where a number of instructions are attached together and marked filed by the clerk on the back of a common wrapper they are sufficiently marked and filed within the meaning of this section [Code 1942, § 1530]. *Gulf & S.I.R.R. v. Boswell*, 85 Miss. 313, 38 So. 43 (1905).

3. Language of instructions.

The words in an instruction must be accorded their customary and usual significance, and if the meaning of an instruction is clear, then hypercritical criticism of the verbiage employed therein will be ignored. *Council v. Duprel*, 250 Miss. 269, 165 So. 2d 134 (1964).

Instructions will not be deemed erroneous if, taken together, they furnish a correct guide for the jury. *Stoner v. Colvin*, 236 Miss. 736, 110 So. 2d 920 (1959).

Instruction correctly stating the law will not be reversed merely because the instruction was too long. *Y.D. Lumber Co. v. Aycock*, 40 So. 2d 551 (Miss. 1949), error overruled, 41 So. 2d 35 (Miss. 1949).

An unhappily phrased instruction or one not exactly technical which does not mislead the jury is not a ground for reversal. *Meridian Sanatorium v. Scruggs*, 121 Miss. 330, 83 So. 532 (1919); *Neely v. City of Charleston*, 204 Miss. 360, 37 So. 2d 495 (1948).

4. Oral instructions.

In an action of bastardy, trial court's comment to defense counsel that questions as to future expenses likely to be incurred for the future support of the child could be asked without violating the rule against conjectural damages was not tantamount to an oral instruction in violation of this section [Code 1942, § 1530]. *Thomas v. Cook*, 229 Miss. 458, 91 So. 2d 275 (1956), motion overruled, 236 Miss. 365, 109 So. 2d 861 (1959).

Where there was an objection to a question asking a witness what effect automobile collision had upon the plaintiff and how the plaintiff's injury affected his palsy condition and whether such condition was better or worse, statements made by the trial court in sustaining the objections did not constitute instructions to the jury. *Welch v. Morgan*, 225 Miss. 154, 82 So. 2d 820 (1955).

5. Requested instructions in general.

Trial judge held without power to prevent submission of cause to jury without instructions for plaintiff, who requested none. *J.C. Penney Co. v. Evans*, 172 Miss. 900, 160 So. 779 (1935).

Plaintiff and defendant having both secured instructions announcing same rule, defendant held estopped from asserting that rule was erroneous and that refusal of defendant's instruction inconsistent therewith was error. *Yazoo & Miss. V. Ry. v. Wade*, 162 Miss. 699, 139 So. 403 (1932).

Error cannot be predicated on failure of the court to give instructions not requested. *Lindsey Wagon Co. v. Nix*, 108 Miss. 814, 67 So. 459 (1915); *Yazoo & Miss. V. Ry. v. Messina*, 109 Miss. 143, 67 So. 963 (1915), rev'd on other grounds, 240 U.S. 395, 36 S. Ct. 368, 60 L. Ed. 709 (1916); *Stevenson v. State*, 136 Miss. 22,

100 So. 525 (1924); *Grady v. State*, 144 Miss. 778, 110 So. 225 (1926).

Instructions must be requested in writing. *St. Louis & S.F. Ry. v. Moore*, 101 Miss. 768, 58 So. 471 (1911); *Lindsey Wagon Co. v. Nix*, 108 Miss. 814, 67 So. 459 (1915).

If a jury, after retiring to consider its verdict, request additional instructions, either party may present and ask for additional written instructions, and it will be error to refuse them on the ground that they are too late. *Wright v. State*, 82 Miss. 421, 34 So. 4 (1903).

An applicant cannot complain of error in an instruction at his own instance, nor of a conflict in instructions caused by his erroneous ones, nor of one more favorable than the law allows. *Clisby v. Mobile & O.R. Co.*, 78 Miss. 937, 29 So. 913 (1901).

6. Time for giving instructions.

After the argument in the case has opened, it is error to give an instruction without stopping the case and giving the opposite party opportunity to comment thereon. *Maxey v. State*, 140 Miss. 570, 106 So. 353 (1925).

A court should not give an instruction without giving the opposite party opportunity to know thereof and read same. *King v. State*, 121 Miss. 230, 83 So. 164 (1919); *Nelson v. State*, 129 Miss. 288, 92 So. 66 (1922).

7. Construction of instructions as a whole.

Instructions should never be used to influence the jury as to how facts should be decided, and when instructions are worded so as to indicate how a jury should decide an issue of fact they are harmful, and unless all instructions, taken together, are written so as to give the jury the full application of the law as to the issues involved the Supreme Court will usually reverse. *Keith v. State*, 197 So. 2d 480 (Miss. 1967), but see *Hall v. State*, 427 So. 2d 957 (Miss. 1983).

An instruction must be considered as a whole, and together with all the instructions received by the parties to the action. *Council v. Duprel*, 250 Miss. 269, 165 So. 2d 134 (1964).

Instructions will not be deemed erroneous if, taken together, they furnish a cor-

rect guide for the jury. *Stoner v. Colvin*, 236 Miss. 736, 110 So. 2d 920 (1959).

Instruction to the effect that constable in pursuit of reckless driver, sounding his siren, was entitled to assume that other drivers would yield right of way, held, in view of other instructions on proximate cause and duty to have regard to safety of others, no error. *Johnson v. Richardson*, 234 Miss. 849, 108 So. 2d 194 (1959).

Jury is presumed to have obeyed and applied instructions and to have considered them as a whole. *Johnson v. Richardson*, 234 Miss. 849, 108 So. 2d 194 (1959).

In an action upon an accidental death insurance policy, where the insurance company asked for and was granted instructions which covered every defense to which it was entitled, two of which were in substantially the same terms as the two instructions refused by the court, the court did not err in refusing the additional instructions. *Benefit Ass'n of Ry. Emp. v. Harrison*, 233 Miss. 834, 103 So. 2d 925 (1958).

All instructions must be read and considered together. *American Creosote Works, Inc. v. Smith*, 233 Miss. 892, 103 So. 2d 861 (1958).

Even though some imperfections could be found therein, instructions, which when read together, focused the attention of the jury on the real issue of whether the plaintiff's truck was overtaken from behind, run into and damaged by the negligence of the defendant's driver in operating his truck without proper control, without keeping a proper lookout, and at a negligent rate of speed, or whether plaintiff's driver negligently stopped his truck on the half-moon curve in the right lane of the pavement when it was unnecessary and impractical to do so, and, if so, whether such negligence was the sole, proximate cause of the collision, were not reversibly erroneous. *Green Truck Lines v. Hooper*, 233 Miss. 794, 103 So. 2d 443 (1958).

Instructions, which, when read together, properly instructed the jury as to the degree of care required to be exercised by a nursing home operator toward an aged patient, answered plaintiff's complaint directed toward two certain instructions granted to the defendant.

Lagrone v. Helman, 233 Miss. 654, 103 So. 2d 365 (1958).

Not every erroneous instruction requires a reversal of the judgment or the granting of a new trial, but all the instructions must be read and considered together, and, if the instructions, when read and considered as a whole, contain a fairly consistent statement of the law, the judgment will not be reversed because of errors in particular instructions, unless the errors are of such nature as to mislead a jury as to the real issues upon which they are to pass. *Scoggins v. Vicksburg Hosp.*, 229 Miss. 770, 91 So. 2d 837, 70 A.L.R.2d 368 (1957).

In an action by a patient against a hospital for injuries sustained as the result of a newsboy entering the patient's hospital room while the patient was asleep and striking him on the foot, thereby disturbing the patient and causing patient to fall or jump out of bed, in view of other instructions given, an erroneous instruction that to constitute negligence the jury would have to find that the hospital could have or should have foreseen that the newsboy would probably have entered the patient's hospital room while he was alone and asleep and the newsboy probably would have struck him or startled him, and as a result of which the patient would jump from or start up in his bed, did not require a reversal of judgment. *Scoggins v. Vicksburg Hosp.*, 229 Miss. 770, 91 So. 2d 837, 70 A.L.R.2d 368 (1957).

In an action on seller's demand for the enforcement of his purchase money lien for the balance allegedly due on the purchase of a used airplane, the giving of instructions, which, when read and considered together, were not contradictory or misleading and constituted a sufficient statement of the law on the issue submitted to the jury, was not reversible error. *Blount v. Hair*, 228 Miss. 898, 90 So. 2d 5 (1956).

In suit by employee against employer for personal injuries, instruction granted employee on issue of whether or not employer took reasonable care to furnish employee with reasonably safe place to work is not reversibly erroneous when that phase of law is thoroughly covered by

instructions granted employer and is fairly and sufficiently submitted to jury, since all instructions must be read together. *Johns-Mansville Prods. Corp. v. Cather*, 208 Miss. 268, 44 So. 2d 405 (1950).

When jury is fully charged in numerous instructions for both parties as to applicable law of case, two instructions, even if erroneous because referring to allegations of declaration, are not so prejudicial as to require reversal. *Jessup v. Reynolds*, 208 Miss. 50, 43 So. 2d 753 (1949).

Instruction in action by employee against railroad for damages for personal injury, which is technically erroneous in that it failed to contain work "reasonably" before word "safe" in the phrase "negligent in failing to use reasonable care to maintain the switch...in a safe condition," is harmless and not sufficient to require reversal when all instructions as whole correctly defined defendant's duty. *St. Louis-San Francisco Ry. v. Dyson*, 207 Miss. 639, 43 So. 2d 95 (1949).

Construction of all of the instructions as a whole will not cure an instruction that is contradictory of the other instructions and entirely contrary to the law. *Wallace v. Billups*, 203 Miss. 853, 33 So. 2d 819 (1948).

Instruction as to liability of master for injury to the servant with respect to the manner in which servant was required to perform his work was not erroneous when considered with all the other instructions in the case. *C. & R. Lumber Co. v. Crane*, 135 Miss. 303, 99 So. 753 (1924).

Although one instruction standing alone may be incorrect, yet if all the instructions taken together constitute the law correctly given the error is harmless. *City of Hattiesburg v. Beverly*, 123 Miss. 759, 86 So. 590 (1920).

On a point covered by other instructions it is not error to refuse an instruction. *Yazoo & Miss. V. Ry. v. Walls*, 110 Miss. 256, 70 So. 349 (1915); *Illinois Cent. R.R. v. Redmond*, 119 Miss. 765, 81 So. 115 (1919); *Bonelli v. Branciere*, 127 Miss. 556, 90 So. 245 (1921), overruled on other grounds, *Vascoe v. Ford*, 212 Miss. 370, 54 So. 2d 541 (1951); *T.J. Moss Tie Co. v. Bank of Decatur*, 97 So. 417 (Miss. 1923).

It is not error to instruct the jury that private property cannot be damaged for

public use except on due compensation being first made where all the charges construed together correctly stated the law. *Warren County v. Rand*, 88 Miss. 395, 40 So. 481 (1906).

Instructions for plaintiff and defendant must be considered together, and if, on the whole, it appears that the law was fairly embodied in the instructions, the verdict will be upheld. *Yazoo & Miss. V. Ry. v. Williams*, 87 Miss. 344, 39 So. 489 (1905); *Mississippi Cent. R.R. v. Hardy*, 88 Miss. 732, 41 So. 505 (1906); *Yazoo & Miss. V. Ry. v. Kelly*, 98 Miss. 367, 53 So. 779 (1910).

8. Applicability and responsiveness to pleadings.

An instruction on one count in a declaration should be limited to said count, otherwise it may constitute reversible error. *Thames v. Batson & Hatton Lumber Co.*, 143 Miss. 5, 108 So. 181 (1926).

An instruction assigning negligence not alleged in the declaration and not shown to be the proximate cause of the injury should not be given. *Hines v. McCullers*, 121 Miss. 666, 83 So. 734 (1920).

An instruction on a count in the declaration withdrawn from the jury may be reversible error. *National Life & Accident Ins. Co. v. De Vance*, 110 Miss. 196, 70 So. 83 (1915).

An instruction must confine rights of recovery on facts alleged in the pleading. *McLeod Lumber Co. v. Anderson Mercantile Co.*, 105 Miss. 498, 62 So. 274 (1913).

An instruction directing the jury to return a verdict in favor of the plaintiff if the evidence showed that she was injured in the manner set out in the declaration was error as tending to confuse and mislead the jury, but such error was not prejudicial where the facts on which the cause of action was grounded were so set out in the declaration that the jury could readily refer to them and ascertain what the court meant by the instruction, and the facts necessary for the jury to believe in order to render a verdict for plaintiff were sufficiently set out in other portions of the instructions. *Southern Ry. v. Ganong*, 99 Miss. 540, 55 So. 355 (1911).

If plaintiff's agent consented to defendant's entry and cutting of timber, in case of trespass an instruction that defendant

would not be liable where there is no count for the value of the timber, is not erroneous. *Hicks v. Mississippi Lumber Co.*, 95 Miss. 353, 48 So. 624 (1909).

9. Applicability of instructions to issues.

Where a landowner alleged and presented testimony to the effect that a municipality was responsible for sewage invading his land where his cows consumed a quantity of the same resulting in the death of some of them, the landowner made out a case of absolute liability, and the allegation of negligence was surplusage and instructions which may not have adequately defined negligence or set forth acts or omissions constituting negligence were mere surplusage. *Town of Fulton v. Mize*, 274 So. 2d 129 (Miss. 1973).

In action brought by house mover against electric company for injuries he received from coming into contact with live power line, and instruction for defendant that if jury believed plaintiff knew and appreciated dangers existing in connection with overhead power line and voluntarily placed himself in a position to come in contact with it he had assumed the risks incident thereto, including any negligence of defendant, defendant would not be liable for plaintiff's injuries, was erroneously granted; for it prevented application of comparative negligence doctrine by jury and eliminated distinction between assumption of risk and contributory negligence, where there was evidence in record to the effect that an employee of defendant told plaintiff the wire was harmless and plaintiff should take hold of it and lift it up. *Crouch v. Mississippi Power & Light Co.*, 193 So. 2d 144 (Miss. 1966).

In an eminent domain action where both a mortgagor and mortgagee were parties defendant, it was error to grant an instruction that under Article 1, § 10, of the United States Constitution, no state should enact a law impairing the obligation of prior contracts, for the reason that such an instruction had no place in the action. *Mississippi State Hwy. Comm'n v. Nixon*, 253 Miss. 636, 178 So. 2d 680 (1965).

Since common-law principles of negligence applied to an action arising out of a

motor vehicle collision at an intersection of an existing public road and a new highway under construction which was not open to general vehicular traffic, the court committed reversible error in giving the favored driver instruction, which is solely statutory in origin. *Carlisle v. Cobb Bros. Constr. Co.*, 238 Miss. 681, 119 So. 2d 918 (1960).

An instruction in an assault action as to the permissibility of a finding for plaintiff need not predicate absence of justification by insult by words where, under the evidence, justification is not an issue; nor need it exclude self-defense where the evidence shows that plaintiff was attacked by defendant while conversing with another. *Pittman v. Partin*, 236 Miss. 517, 111 So. 2d 238 (1959).

In an action against a municipal policeman and the surety upon his official bond for assault upon the plaintiff by the policeman, the trial court did not err in refusing to instruct that the surety company would not be liable for anything unless the policeman was first liable, and that, if the surety was required to pay any part of the judgment, then the individual defendant would be obligated to reimburse the surety for that amount. *Vanderslice v. Shoemaker ex rel. Dabbs*, 233 Miss. 523, 102 So. 2d 804 (1958).

In wrongful death action arising out of defendant's automobile colliding with a bicycle ridden by a nine-year-old child upon the highway, where it appeared that the defendant was confronted with the danger of injury to the boy when he first saw him peddling his bicycle on the highway in front of him, and had had ample time to sound his horn, and bring his automobile under proper control, the court erred in granting an instruction on the sudden emergency doctrine, since it was inapplicable in the case. *Moak v. Black*, 230 Miss. 337, 92 So. 2d 845 (1957).

In an action by a patient against the hospital for injury sustained as a result of a newsboy entering the patient's hospital room while he was asleep, and striking him on the foot with a newspaper, thereby startling and causing patient to jump or fall out of bed, it was not error for the court to refuse to instruct that if the plaintiff's injury was caused by the con-

curring negligence of the hospital's employees and the newsboy, the hospital would be liable to the same extent as though the injury had been caused by the hospital's negligence alone, where the newsboy was not sued as a codefendant and it was not claimed that any hospital employees entered the hospital room with the newsboy, or had any part in the creation of the disturbance complained of. *Scoggins v. Vicksburg Hosp.*, 229 Miss. 770, 91 So. 2d 837, 70 A.L.R.2d 368 (1957).

Instructions, regardless of the theoretical law announced thereby, should be applicable to the issues and proof of the particular case. *Hunt v. Sherrill*, 195 Miss. 688, 15 So. 2d 426 (1943).

Where the real issues of the case are presented by other instructions, it is not reversible error to instruct the jury on a question of law not raised as an issue where it appears to be harmless. *Cecil Lumber Co. v. McLeod*, 122 Miss. 767, 85 So. 78, 11 A.L.R. 776 (1920).

An instruction should not eliminate an issue supported by the evidence. *McNeill v. Bay Springs Bank*, 100 Miss. 271, 56 So. 333 (1911); *Lackey v. St. Louis & S.F.R. Co.*, 102 Miss. 339, 59 So. 97 (1912); *Harrison v. Garner*, 110 Miss. 586, 70 So. 700 (1915).

10. Applicability and responsiveness to evidence.

A requested jury instruction should be denied where, on the evidence, no reasonable juror could, consistent with his oath, find the fact supporting the instruction. *Graves v. Graves*, 531 So. 2d 817 (Miss. 1988).

An instruction in an action to recover under a health and accident policy for medical and hospital expenses, to the effect that the plaintiff was not entitled to recovery if he was engaged in the commission of an assault or a felony at the time of injury, was defective on the theories that it was too abstract and not sufficiently related to the facts of the case, where the evidence supported a finding that the insured received his injury while engaged in the pursuit of another person for the purpose of making an unlawful arrest. *Taylor v. Taylor*, 260 So. 2d 448 (Miss. 1972).

In an action on a major medical policy which precluded recovery for care fur-

nished the insured injured while participating in an assault or a felony, an instruction that if the jury should find that the insured, who was hospitalized after being shot while attempting to make a citizen's arrest for a traffic offense, arrested or pursued another for the purpose of arresting without a warrant for an indictable offense or a breach of the peace threatened or attempted in his presence, it would be the jury's duty to return a verdict for the insured, was erroneous where it appeared from the evidence that the insured thought of making a citizen's arrest only after he had failed to find the sheriff and after any traffic offense had long been completed by the victim. *Protective Life Ins. Co. v. Spears*, 231 So. 2d 510 (Miss. 1970).

An instruction should not be given on a charge of negligence not supported by any proof. *New Orleans & N.E.R. Co. v. Ready*, 238 Miss. 199, 118 So. 2d 185 (1960).

In an action arising out of an intersectional motor vehicle collision, where the evidence showed that plaintiff's automobile actually entered the intersection first, the trial court committed reversible error in giving an instruction asserting that failure of plaintiff to yield the right of way, if defendant had already entered the intersection, would constitute negligence. *Carlisle v. Cobb Bros. Constr. Co.*, 238 Miss. 681, 119 So. 2d 918 (1960).

In an action for property and personal injury damages suffered by plaintiff when his wagon, while being drawn upon the highway by mules, was struck by defendant's truck, when the record failed to disclose that plaintiff was guilty of the slightest negligence, the trial committed reversible error in instructing that if damages suffered by plaintiff were caused by his own negligence, verdict should be for the defendant. *Hughes v. Wright*, 233 Miss. 541, 102 So. 2d 798 (1958).

Where there was no proof that the plaintiff had proceeded blindly down a street at an excessive speed to an intersection where a collision occurred, the court's instruction which had the effect of charging the jury that plaintiff had done so, and which was also argumentative and confusing, constituted reversible error. *Wells v. Bennett*, 232 Miss. 736, 100 So. 2d 344 (1958).

Where the maker had admitted the execution of the note, and no credit appeared thereon, and the plaintiff, who was the wife of the payee, had testified that the note had not been paid, the court erred in telling the jury that the plaintiff relied entirely on circumstantial evidence, and that it was the sworn duty of each member of the jury to consider all the circumstantial evidence with great care and caution. *Jenkins v. Jenkins*, 232 Miss. 879, 100 So. 2d 789 (1958).

In an action by plaintiff for injuries sustained in an intersection automobile collision, the trial court committed reversible error in instructing that the driver of the car in which plaintiff was riding was guilty of negligence in driving his car into the intersection of a through highway without looking to the north immediately before doing so, and that judgment should be for defendants if such negligence were the proximate cause of the collision, where both plaintiff and the driver had testified that before entering the intersection they had looked both to the north and to the south. *Moore v. Herman Guy Auto Parts, Inc.*, 230 Miss. 189, 92 So. 2d 373 (1957).

The court erred in instructing that if the jury believed that a nine-year-old boy, riding a bicycle on the highway, was aware of the approach of the defendant's automobile, or that the actions of the boy while riding on the highway were such that reasonably led the defendant to believe that the child had noticed and was fully aware of the approach of his automobile, the defendant was under no legal duty to sound his horn and continue sounding his horn at short and frequent intervals when approaching the child, where there was no evidence warranting a finding that the boy was aware of the approach of the automobile prior to the time the defendant had sounded his horn when he was only 12 or 15 feet from the child. *Moak v. Black*, 230 Miss. 337, 92 So. 2d 845 (1957).

In an action by a plaintiff for personal injuries sustained when a truck in which she was a passenger was struck by defendant's automobile while undertaking to turn from the right lane of traffic across the oncoming traffic lane to enter a driveway, an instruction as to the general duty

of an automobile driver with reference to stopping, if necessary to avoid a collision with others, and what it takes to constitute that operation, and submitting the issue as to whether defendant was driving her car so as to be able to avoid such a collision, was not erroneous under the evidence, particularly where, in view of the defendant's own admission, it was clear that she should have reduced her speed, or halted her car completely, if necessary, but that instead of doing this she approached the driveway at an admitted speed of 50 miles an hour, having every reason to believe and know that the truck was in the act of turning or would turn into the driveway. *Hamilton v. McCry*, 229 Miss. 481, 91 So. 2d 564 (1956).

Where the evidence would not support a finding that plaintiff's negligence was the sole proximate cause of the intersectional collision, the court erred in instructing that plaintiff, at the time of the accident, was under a duty to maintain a look-out for all persons who might have been on or about to cross the highway on which he was traveling, and to use every reasonable precaution to avoid injury or damage to such person, and if plaintiff's failure to do so solely and proximately caused the collision, the jury should find for the defendant. *Cobb v. Williams*, 228 Miss. 807, 90 So. 2d 17 (1956).

In a case in which evidence supports but one theory upon which plaintiff is entitled to prevail, an instruction which might mislead jury into another and different theory should not be given. *Owen v. Sumrall*, 204 Miss. 15, 36 So. 2d 800 (1948).

The theory of a party may be embodied in his instruction through the recital of facts if there is testimony to support it and if the jury's verdict on that theory is made conditional on its finding that such facts existed. *Murphy v. Burney*, 27 So. 2d 773 (Miss. 1946).

Instruction of jury on a correct principal of law, if inapplicable to the facts of the case, was harmless in view of the fact that the jury were instructed in other instructions as to every phase of the questions submitted to them. *Mississippi Fire Ins. Co. v. Dixon*, 133 Miss. 570, 98 So. 101 (1923).

An instruction assigning negligence not alleged in the declaration and not shown to be the proximate cause of the injury should not be given. *Hines v. McCullers*, 121 Miss. 666, 83 So. 734 (1920).

An instruction as to argument of counsel is improper. *O'Leary v. Illinois Cent. R. Co.*, 110 Miss. 46, 69 So. 713 (1915).

An instruction held erroneous because imposing too great a burden on plaintiff. *Gentry v. Gulf & S.I.R. Co.*, 109 Miss. 66, 67 So. 849 (1915).

The proximate cause of injury should be submitted to the jury upon proper instructions of the facts. *Yazoo & Miss. V. Ry. v. Smith*, 103 Miss. 150, 60 So. 73 (1912).

It is error to give an instruction having no application to the facts in the case. *Fairfield v. Louisville & N. R. Co.*, 94 Miss. 887, 48 So. 513 (1909); *New Orleans & N.E.R. Co. v. Williams*, 96 Miss. 373, 53 So. 619 (1909); *Easley v. Alabama G.S.R. Co.*, 96 Miss. 396, 50 So. 491 (1909); *Hunnicut v. Alabama G.S.R. Co.*, 50 So. 697 (Miss. 1909).

A case in which too high degree of proof is required by the instructions. *Colored Knights of Pythias v. Tucker*, 92 Miss. 501, 46 So. 51 (1908).

Instructions on points not raised by the evidence are properly refused. *Mobile, J. & K.C.R. Co. v. Jackson*, 92 Miss. 517, 46 So. 142 (1908); *Kneale v. Lopez & Dukate*, 93 Miss. 201, 46 So. 715 (1908).

In case where there is no conflict of evidence on a point, it is error to give instructions on such point as if the matter was doubtful. *Mobile, J. & K.C.R. Co. v. Jackson*, 92 Miss. 517, 46 So. 142 (1908).

Where there is no evidence upon which to predicate an instruction it is erroneous to give one. *Burnley v. Mullins*, 86 Miss. 441, 38 So. 635 (1905); *American Cent. Ins. Co. v. Antram*, 88 Miss. 518, 41 So. 257 (1906); *Bank of Newton v. Simmons*, 96 Miss. 17, 49 So. 616 (1909); *Alabama & V. Ry. Co. v. Baldwin*, 96 Miss. 52, 52 So. 358 (1909); *New Orleans & N.E.R. Co. v. Williams*, 96 Miss. 373, 53 So. 619 (1909); *Hooks v. Mills*, 101 Miss. 91, 57 So. 545 (1912); *Yazoo & Miss. V. Ry. v. Dyer*, 102 Miss. 870, 59 So. 937 (1912); *McLeod Lumber Co. v. Anderson Mercantile Co.*, 105 Miss. 498, 62 So. 274 (1913); *Cumberland Tel. & Tel. Co. v. Cosnahan*, 105 Miss.

615, 62 So. 824 (1913); *Yazoo & Miss. V. Ry. v. Aden*, 106 Miss. 860, 64 So. 790 (1914); *J.J. Newman Lumber Co. v. Dantzler*, 107 Miss. 31, 64 So. 931 (1914); *Western Union Tel. Co. v. Robertson*, 109 Miss. 775, 69 So. 680 (1915); *Collins v. Union & Farmers' Bank*, 110 Miss. 506, 70 So. 581 (1915).

Erroneous instructions calculated to mislead the jury are not harmless where the testimony would support a verdict for either party. *B.E. Brister & Co. v. Illinois Cent. R. Co.*, 84 Miss. 33, 36 So. 142 (1904).

An instruction not based on evidence is fatally erroneous if by any means it might mislead the jury. *Southern Ry. v. Lanning*, 83 Miss. 161, 35 So. 417 (1903).

An instruction may embody uncontradicted facts proven on the trial and to refuse such is error. *Moody v. Chas. Galigher & Son*, (Miss. 1886).

It is error to refuse to give instructions conditioned upon the facts adduced from the evidence. *Noel v. Hooker*, (Miss. 1886).

11. Assumption of facts.

An instruction in an automobile collision action to the effect that the plaintiff had been in at least three prior automobile accidents and was permanently injured in one of them was not an erroneous commentary on the evidence where there was no controversy that the plaintiff had been in the other accidents. *Hankins v. Sanderson Farms, Inc.*, 226 So. 2d 723 (Miss. 1969).

Instructions which assume that one vehicle involved in an automobile accident passed another, a disputed question of fact, or which assume that the driver of the vehicle failed to keep a reasonable look out to the rear, should not be granted. *Miller Transporters, Ltd. v. Espey*, 253 Miss. 439, 176 So. 2d 249 (1965).

In an action against the driver by a share-the-expense guest for injuries allegedly sustained when the automobile foot brake failed to function properly, resulting in the driver's automobile colliding into the rear of another automobile, which had come to a stop, a sudden emergency instruction was erroneous which assumed by the use of the words "failure of the defendant's brakes" that there was evidence in the record upon which the jury

might find that both braking systems were defective, when in fact there was no evidence to show that the emergency brake was in any way defective, and which omitted entirely the statement that after the emergency arose, the defendant exercised such care as a reasonably prudent and capable driver would use under the unusual circumstances. *Moore v. Taggart*, 233 Miss. 389, 102 So. 2d 333 (1958).

When there was no proof that the plaintiff had proceeded blindly down a street at an excessive speed to an intersection where a collision occurred, the court's instruction which had the effect of charging the jury that plaintiff had done so, and which was also argumentative and confusing, constituted reversible error. *Wells v. Bennett*, 232 Miss. 736, 100 So. 2d 344 (1958).

In an action arising out of a collision between an automobile and a truck, the trial court's instruction that the uncontradicted proof in the case showed that the truck owned and operated by the defendant was not equipped with clearance lights and side marker lights and reflectors as required by law, and that such failure to have the truck equipped was negligence on the part of the defendants, and that if such negligence proximately contributed to the collision, the jury should find for plaintiff, was not error, even though it may have had the effect of prejudicing the jury as against the defendants, since established facts can properly be assumed in the instructions. *Arnold v. Reece*, 229 Miss. 862, 92 So. 2d 237 (1957).

In an action arising out of a motor vehicle intersectional collision, an instruction should not have been given which was based upon the assumption that the defendant was about to cross at an intersection when the proof showed that the defendant was not about to cross at an intersection, but was about to make a left turn on a through highway upon which he had been traveling. *Cobb v. Williams*, 228 Miss. 807, 90 So. 2d 17 (1956).

In action for damages to automobile arising out of ramming by truck from rear, trial court committed no error in refusing instruction to plaintiff based on assumption that brakes on defendant's truck were

not efficient, when, as matter of fact, there was no such evidence in record. *Wilburn v. Gordon*, 209 Miss. 27, 45 So. 2d 844 (1950).

In action arising out of collision of two trucks on highway, instruction is not erroneous as assuming truck which inflicted damage was owned by defendant when there is no dispute in case that defendant did in truth own it. *West v. Aetna Ins. Co.*, 208 Miss. 776, 45 So. 2d 585 (1950).

Instructions assuming a matter in issue are erroneous. *Dixie Stock Yard, Inc. v. Ferguson*, 192 Miss. 166, 4 So. 2d 724 (1941).

Facts must not be assumed in the giving of instruction. *Griffin v. Griffin*, 93 Miss. 651, 46 So. 945 (1908); *Reid v. Yazoo & Miss. V.R. Co.*, 94 Miss. 639, 47 So. 670 (1909); *Godfrey v. Meridian R. & L. Co.*, 101 Miss. 565, 58 So. 534 (1912); *Illinois Cent. R.R. v. Harris*, 108 Miss. 574, 67 So. 54 (1915).

An instruction assuming on a conflict of evidence that the plaintiff was riding in a dangerous place is erroneous. *Reid v. Yazoo & Miss. V.R. Co.*, 94 Miss. 639, 47 So. 670 (1908).

Where the plaintiff in replevin claims the property under a sale, an instruction which assumes that the sale under which the plaintiff claimed was not bona fide, is erroneous. *Griffin v. Griffin*, 93 Miss. 651, 46 So. 945 (1908).

An instruction is not objectionable as being on the weight of the evidence, because it assumes as true matters proven by both parties or about which there is no controversy. *Alabama & V. Ry. Co. v. Phillips*, 70 Miss. 14, 11 So. 602 (1892).

An instruction is erroneous if it assume as true a disputed fact of vital importance. *French v. Sale*, 63 Miss. 386 (1885).

12. Argumentative instructions.

A condemnor's instruction in an eminent domain proceeding that in determining the fair market value of the defendant's land before the taking of an easement for a power line across it the jury "must take into account" previously existing pipeline easements and the increase or decrease in the value of the defendant's land before the taking which results from the existence of the pipeline easements, and that the jury may not

award to the defendant any amount for damages resulting to the land from the presence of the pre-existing easements, was misleading and argumentative and constituted a comment on the testimony in the case. *White v. Mississippi Power Co.*, 252 Miss. 97, 171 So. 2d 312 (1965).

Where there was no proof that the plaintiff had proceeded blindly down a street at an excessive speed to an intersection where a collision occurred, the court's instruction which had the effect of charging the jury that plaintiff had done so, and which was also argumentative and confusing, constituted reversible error. *Wells v. Bennett*, 232 Miss. 736, 100 So. 2d 344 (1958).

And a refusal of such instructions is not reversible error. *Carter v. State*, 140 Miss. 265, 105 So. 514 (1925).

Instructions should not be argumentative nor on the weight of the evidence nor emphasize certain portions of the evidence. *Potera v. City of Brookhaven*, 95 Miss. 774, 49 So. 617 (1909).

Where appellant asked for and was given an instruction propounding a legal proposition as applicable to the case, he cannot complain of an instruction for the appellee because it propounded the same proposition. *Gulf & S.I.R.R. v. Boswell*, 85 Miss. 313, 38 So. 43 (1905).

13. Conflicting and inconsistent instructions.

A trial court committed reversible error in peremptorily instructing the jury in a personal injury action that the defendant was negligent as a matter of law and then instructing the jury that the plaintiffs were still required to prove that the defendant was negligent by a preponderance of the evidence, since the instructions were contradictory as well as confusing. *Elam v. Pilcher*, 552 So. 2d 814 (Miss. 1989).

Where the plaintiff's automobile struck the defendant's automobile which was disabled on the highway as a result of an accident caused by the defendant's negligence, the court properly refused the defendant's instruction that the driver of the plaintiff's automobile was guilty of negligence as a matter of law, for this instruction was in conflict with an instruction given for the plaintiff in which the court properly instructed the jury that the neg-

ligence of the defendant caused or contributed to the second accident. *Huff v. Boyd*, 242 So. 2d 698 (Miss. 1971).

A peremptory instruction for the plaintiff and an "unavoidable accident" instruction given for one of the defendants are in conflict and could only serve to confuse the jury. *Miller Transporters, Ltd. v. Espey*, 253 Miss. 439, 176 So. 2d 249 (1965).

An instruction is not objectional as in conflict with another, where such other was improperly given. *Vaughan v. Lewis*, 236 Miss. 792, 112 So. 2d 247 (1959).

In an action for personal injuries sustained in an automobile collision, the trial court erred in granting the plaintiff an instruction with reference to whether the driver of the automobile has a right to assume that all other persons are obeying the traffic laws, which instruction was also in conflict with one granted to the defendant, but where it appeared from the record that no impartial jury, duly mindful of the obligations of their oath, could have reached a different result, the Supreme Court, under Rule 11, Revised Rules of the Supreme Court, refused to reverse the case. *Brown v. Addington*, 233 Miss. 435, 102 So. 2d 365 (1958).

Instructions that if the jury were reasonably satisfied from a preponderance of the evidence that the defendant committed the fraud complained of, verdict should be rendered for plaintiff was erroneous, and conflicting and irreconcilable instruction, on behalf of defendant, that fraud must be shown by clear and convincing evidence, did not cure the error. *Hunt v. Sherrill*, 195 Miss. 688, 15 So. 2d 426 (1943).

However, conflicting instructions should not be given. *Illinois Cent. R.R. v. McGowan*, 92 Miss. 603, 46 So. 55 (1908); *McNeill v. Bay Springs Bank*, 100 Miss. 271, 56 So. 333 (1911).

A litigant cannot complain of a conflict in instructions caused by his erroneous ones. *Clisby v. Mobile & O.R. Co.*, 78 Miss. 937, 29 So. 913 (1901).

14. Comment on evidence.

In an action for negligence and breach of warranty arising from the defendant's sale of a combine to the plaintiff, it was error for the court to joke that the combine was manufactured on a Friday the 13th,

as his joke went directly to the quality of the combine. *Parker Tractor & Implement Co. v. Johnson*, — So. 2d —, 1999 Miss. LEXIS 346 (Miss. Nov. 4, 1999).

The trial court in an automobile accident case erred reversibly in granting a jury instruction stating that plaintiff's burden of proving that the injuries complained of were a result of the accident by a preponderance of the evidence was not met by testimony that plaintiff's symptoms appeared after the accident and did not exist prior to the accident, since that instruction was a direct and improper comment upon the evidence by the court in contravention of § 11-7-155, was argumentative, and was misleading. *Barkley v. Miller Transporters, Inc.*, 450 So. 2d 416 (Miss. 1984).

An instruction in an automobile collision action to the effect that the plaintiff had been in at least three prior automobile accidents and was permanently injured in one of them was not an erroneous commentary on the evidence where there was no controversy that the plaintiff had been in the other accidents. *Hankins v. Sanderson Farms, Inc.*, 226 So. 2d 723 (Miss. 1969).

A condemnor's instruction in an eminent domain proceeding that in determining the fair market value of the defendant's land before the taking of a power line easement across it the jury "must take into account" previously existing pipeline easements and the increase or decrease in the value of defendant's land before the taking which results from the existence of such easements, and that the jury may not award to defendant any amount for damages resulting to the land from the presence of the pre-existing easements, was misleading and argumentative and constituted a comment upon the testimony in the case. *White v. Mississippi Power Co.*, 252 Miss. 97, 171 So. 2d 312 (1965).

Where the maker had admitted the execution of the note and no credit appeared thereon, and the plaintiff, who was the wife of the payee, had testified that the note had not been paid, the court erred in telling the jury that the plaintiff relied entirely on circumstantial evidence and that it was the sworn duty of each member

of the jury to consider all the circumstantial evidence with great care and caution. *Jenkins v. Jenkins*, 232 Miss. 879, 100 So. 2d 789 (1958).

Instruction in substance that witnesses in automobile colliding with bus were interested, and witnesses in bus were disinterested, and to consider interest in weighing testimony, held error as comment on evidence. *D'Antoni v. Teche Lines*, 163 Miss. 668, 143 So. 415 (1932).

15. Weight of evidence.

Defendant power company's instruction in wrongful death action to the effect that the deceased was presumed to have seen the electric power line and to have known of its presence, was properly refused, since there was no presumption to that effect, and moreover the instruction was an attempt to instruct on the weight and worth of the evidence by adding an inference in violation of Code 1942, § 1530. *Mississippi Power & Light Co. v. Shepard*, 285 So. 2d 725, 82 A.L.R.3d 86 (Miss. 1973).

A jury instruction for the defendant in an automobile collision case to the effect that if the jury finds, after considering all of the evidence, that the evidence is evenly balanced for the defendant and for a plaintiff, they must find for the defendant, was erroneously granted. *First Nat'l Bank v. Mississippi State Hwy. Comm'n*, 227 So. 2d 118 (Miss. 1969).

An instruction on reputation which required a jury to weigh the evidence of diagnosis and treatment in the light of a doctor's reputation was, in effect, an instruction upon the weight of the testimony in violation of the requirements of this section [Code 1942, § 1530], and the instruction was improvidently given in a malpractice case in which the reputation of the physician was not in issue. *DeLaughter v. Womack*, 250 Miss. 190, 164 So. 2d 762 (1964), overruled on other grounds, *Hall v. Hilbun*, 466 So. 2d 856 (Miss. 1985).

An instruction in a condemnation case was improper where it told the jury that the burden of proof is on the condemnor to show by the greater weight of the more convincing evidence the amount of defendant's damage, and that such burden is not met if the evidence for defendant is

just as strong and convincing, in which case they would return a verdict for defendant in such amount as in view of all the evidence would afford full compensation. *Mississippi State Hwy. Comm'n v. Fisher*, 249 Miss. 198, 161 So. 2d 780 (1964).

In a personal injury action arising out of a motor vehicle collision, an instruction that the burden was on the plaintiff to prove the material allegations of his declaration by preponderance of the testimony, and if he had failed in this, it was the jury's sworn duty to find for the defendant, was disapproved. *Winfield v. Magee*, 232 Miss. 57, 98 So. 2d 130 (1957).

In a will contest where the court instructs the jury for the contestants that they may consider as a circumstance against the validity of the will the long time intervening between the death of the testator and the date when the will was produced for probate, the instruction was erroneous not only that it singled out portions of the evidence, but it was also a charge upon the weight of evidence in direct contravention of this section [Code 1942, § 1530]. *Harrison v. Gatewood*, 211 Miss. 121, 51 So. 2d 59 (1951).

When facts are established by preponderance of evidence, jury may believe those facts from the evidence, and it is wholly unnecessary for an instruction to contain word "preponderance" in such instances. *St. Louis-San Francisco Ry. v. Dyson*, 207 Miss. 639, 43 So. 2d 95 (1949).

In action for damages for false arrest and imprisonment wherein evidence shows that defendant failed to attend court because of illness, that no notice of trial date and that prosecution was dismissed without trial and exoneration of plaintiff, instruction that ill health on part of one guilty of falsely or maliciously causing arrest of another is no excuse in law is bad because it is an instruction on weight of evidence. *Simonton v. Moore*, 204 Miss. 760, 38 So. 2d 94 (1948).

Instruction in an action for injuries to a child ten or twelve years old from contact with an electric wire, that the jury in determining contributory negligence must "consider the fact that the plaintiff in this case has lived all his life in a city, where they had electric lights and electric wires, and the fact that the plaintiff thus had

opportunities to learn and appreciate the dangers of such agencies," is erroneous, as being a charge on the weight of the evidence. *Potera v. City of Brookhaven*, 95 Miss. 774, 49 So. 617 (1909).

Instruction on weight of evidence is erroneous. *Potera v. Brookhaven*, 95 Miss. 774, 49 So. 617 (1909); *Hooks v. Mills*, 101 Miss. 91, 57 So. 545 (1912).

An instruction on the weight of evidence is forbidden. *French v. Sale*, 63 Miss. 386 (1885); *Williams v. State*, 32 Miss. 389 (1856); *Potera v. Brookhaven*, 95 Miss. 774, 49 So. 617 (1909).

An instruction that the testimony of experts is to be "received with caution, as the opinion of such witnesses, however honestly entertained, may be erroneous," is on the weight of evidence. *Louisville, N.O. & T. Ry. v. Whitehead*, 71 Miss. 451, 15 So. 890, 42 Am. St. R. 472 (1894).

In view of the facts an instruction was held to be on the weight of the evidence and erroneous. *Kimbrough v. Ragsdale*, 69 Miss. 674, 13 So. 830 (1892).

An instruction is not objectionable as being on the weight of the evidence, because it assumes as true matters proven by both parties or about which there is no controversy. *Alabama & V. Ry. Co. v. Phillips*, 70 Miss. 14, 11 So. 602 (1892).

16. Undue prominence to particular matters.

An instruction that the law did not countenance blind reliance upon an automobile operator, approaching a stop sign, observing it, so, even if plaintiff was driving his automobile on a through street protected by stop signs, he did not have an unqualified privilege in the right of way, and was under a duty to observe due care in approaching and traversing the intersection, placed undue emphasis on plaintiff's duty to observe due care to avoid the collision and practically relieved the defendant from any duty to exercise due care at the intersection. *Dame v. Estes*, 233 Miss. 315, 101 So. 2d 644 (1958).

Instruction giving undue prominence to certain evidence is erroneous. *Hooks v. Mills*, 101 Miss. 91, 57 So. 545 (1912).

Instruction in action for injuries to a child, ten or twelve years old, from contact with electric wire, that jury in determining contributory negligence must consider

the fact that plaintiff had lived all his life in the city where they had electric lights and wires, and the fact that he thus had opportunities to learn and appreciate their danger, held erroneous as singling out and giving undue prominence to a part of the evidence, to the exclusion of the remainder. *Potera v. City of Brookhaven*, 95 Miss. 774, 49 So. 617 (1909).

17. Peremptory instruction.

In an action by an employee against his employer arising from an on-the-job injury, the trial court properly granted the employee peremptory instructions on contributory negligence and assumption of the risk, even though § 11-7-17 provides that "all questions of negligence and contributory negligence shall be for the jury to determine," where there was no proof indicating that any potential negligence or assumption of the risk by the employee led to the injury. *Mayor & Bd. of Aldermen v. Young*, 616 So. 2d 883 (Miss. 1992).

The rule for determining whether a peremptory instruction is appropriate requires that all evidence favorable to the party against whom the peremptory instruction is requested must be accepted as true, all evidence in favor of the party requesting the peremptory instruction in conflict with that of the other party must be disregarded, and if the evidence and the reasonable inferences to be drawn from same will support a verdict for the party against whom it is requested, then the peremptory instruction should be refused. *Whittle v. City of Meridian*, 530 So. 2d 1341 (Miss. 1988).

If the court is in doubt whether a peremptory instruction should be granted, the proper procedure is for the court to submit the issue to the jury, then, if the court determines upon further deliberation that the verdict is contrary to law, to sustain a motion for a judgment notwithstanding the verdict, so that, if the Supreme Court concludes that the granting of such judgment was error, the judgment based on the jury verdict can be reinstated without the necessity of remanding the case for a new trial, saving time and expense for the court and litigants. *Astleford v. Milner Enters., Inc.*, 233 So. 2d 524 (Miss. 1970).

Where the sole and proximate cause of an accident which occurred when a tire of a bus sustained a blowout was the bus company's negligence in using a recapped tire on the front wheel of the bus in violation of federal and state regulations, the plaintiffs were entitled to a peremptory instruction against the bus company but were not entitled to such instruction against both the busdriver and the bus company. *Martin v. State*, 222 So. 2d 816 (Miss. 1969).

In an action for injuries sustained by a contractor's laborer during the construction of a chicken house, where there was ample proof in the record from which the jury could determine that the contractor was negligent in backing a truck into the laborer, pinning him against the side of the chicken house, the contractor's motion for a peremptory instruction and motion for a directed verdict were properly refused. *Smith v. Jones*, 220 So. 2d 829 (Miss. 1969).

In an action against an owner and a contractor for injuries sustained by the contractor's laborer during the construction of a chicken house, where the owner exercised absolutely no control over the details of the construction or acts of the contractor's three laborers, so that the contractor was an independent contractor and not a servant of the owner, and there was no agency relationship between them, negligence of the contractor could not be imputed to the owner, and the owner was entitled to a peremptory instruction absolving him of liability. *Smith v. Jones*, 220 So. 2d 829 (Miss. 1969).

In a bank's replevin suit, in which it alleged that the bank was entitled to immediate possession of a house trailer being wrongfully withheld from the bank by the alleged purchasers of the trailer under a conditional sales contract held by the bank, where the bank rested after introducing into evidence the affidavit in replevin, the writ of replevin with the sheriff's return thereon, and its declaration in replevin, and nothing further, the motion of the defendants for a directed verdict at that time, should have been sustained, the bank having introduced no evidence to show its right to the immediate possession of the trailer. *Patrick v. Michigan Nat'l Bank*, 220 So. 2d 273 (Miss. 1969).

Where evidence is uncontradicted that plaintiffs' decedent failed to stop at a stop sign as required by Code 1942, § 8197, the defendants were entitled to a peremptory instruction that if such failure was the sole proximate cause of the injuries and death of the decedent the jury should find for the defendants. *Bush Constr. Co. v. Walters*, 254 Miss. 266, 179 So. 2d 188 (1965).

A peremptory instruction that defendant driver was guilty of negligence that proximately contributed to the collision and the resulting death of plaintiffs' decedent, on the theory that the result in a former case involving the same collision but a different decedent was the law of the present case, was erroneously granted. *Bush Constr. Co. v. Walters*, 254 Miss. 266, 179 So. 2d 188 (1965).

A peremptory instruction for the plaintiff and an "unavoidable accident" instruction given for one of the defendants are in conflict and could only serve to confuse the jury. *Miller Transporters, Ltd. v. Espey*, 253 Miss. 439, 176 So. 2d 249 (1965).

In a wrongful death case arising from an automobile collision involving several vehicles, for the plaintiff to be entitled to a peremptory instruction it should appear from the evidence which defendant or defendants is guilty of negligence proximately contributing to his injury, and such an instruction should not be given directing the jury to find someone among the defendants who should pay. *Miller Transporters, Ltd. v. Espey*, 253 Miss. 439, 176 So. 2d 249 (1965).

Where under the evidence the jurors could have found, and evidently did, that plaintiff, while endeavoring to pass a trailer-truck, gave the proper signal and acted as a prudent man, but that defendant pulled into the left lane and struck the plaintiff's automobile without giving any kind of warning or signal that he was leaving the right or east lane and pulling into the west lane, the peremptory instruction requested by the defendant was properly refused. *American Creosote Works, Inc. v. Smith*, 233 Miss. 892, 103 So. 2d 861 (1958).

In an action for personal injuries sustained when a blind pedestrian was struck when defendant backed his auto-

mobile from his driveway to a public street in a thickly populated neighborhood, where the evidence established that the defendant failed to stop his automobile upon the rear of the driveway before entering the sidewalk area, the trial court properly granted the pedestrian a peremptory instruction and liability. *Hatten v. Brame*, 233 Miss. 509, 103 So. 2d 4 (1958).

In an action against a municipal policeman and the surety on his official bond for wrongful assault upon the plaintiff by the policeman, where the jury was warranted in finding that the assault and battery was committed by the officer while acting under color of his office, and that his acts were not purely private and personal, the defendants were not entitled to a peremptory instruction. *Vanderslice v. Shoemaker ex rel. Dabbs*, 233 Miss. 523, 102 So. 2d 804 (1958).

Plaintiff, in an action for the wrongful death of a four and one-half year old child, was not entitled to a peremptory instruction, where he offered no witnesses to contradict the testimony of the defendant and his wife that the boy and his grandmother were walking along the highway shoulder and the child jerked loose from the grandmother and suddenly darted in front of defendant's automobile, but relied largely upon testimony as to measurements and distances, from which it was argued that the accident could not happen in the manner in which the defendant had stated. *Hawkins v. Rye*, 233 Miss. 132, 101 So. 2d 516, 77 A.L.R.2d 663 (1958).

Where a loan service company purported to make arrangements for a borrower to borrow money from another firm, which did not actually loan money on the borrower's credit but on the unconditional indorsement of the loan by the loan service company, the loan service company was not a broker, but the lender, so that a "brokerage" fee of \$13 on a loan of \$25 was in fact interest and usurious, and in a *replevin* action against a borrower by the trustee of the loan service company, the borrower was entitled to a peremptory instruction. *Richardson v. Cortner*, 232 Miss. 885, 100 So. 2d 854 (1958).

In absence of any proof that the insured had any enforceable rights against an-

other for damages to which the insurer had been subrogated, the trial court properly granted a peremptory instruction in favor of the insured in an action by the insurer for damages for the breach of a subrogation agreement. *Washington Fire & Marine Ins. Co. v. Williamson*, 233 Miss. 33, 100 So. 2d 852 (1958).

In an action by a motorist for injuries sustained when his automobile was struck from behind by a truck owned by employer and driven by an employee, wherein the employer contended that at the time of the collision the employee had forsaken the employer's business and was pursuing a mission personal to the employee and on a route wholly different from what he had previously used, the employer was not entitled to the peremptory instruction, where it appeared that even if the employee had deviated from his route he had not abandoned his master's business. *Pennebaker v. Parker*, 232 Miss. 725, 100 So. 2d 363 (1958).

Where the record disclosed that the tenant had sustained some damages which should have been offset against the rent and attorney's fee sued for by the landlords, the landlords were not entitled to a peremptory instruction for the amount sued for. *Walters v. Fine*, 232 Miss. 494, 95 So. 2d 229 (1957).

Where a church, although refusing Highway Commission's offer of \$1,500 for particular land, accepted a \$1,600 check given as consideration for the land, indorsed it by its officers, deposited it, and made disbursement from the funds, the church ratified the sale and the Highway Commission was entitled to a peremptory instruction in the church's action for trespass and taking of the property. *Mississippi State Hwy. Dep't v. Bethlehem Baptist Church*, 232 Miss. 335, 99 So. 2d 221 (1957).

Where the defendant's testimony as to his own good faith in cutting timber was uncontradicted, and plaintiff admitted that no merchantable timber had been cut, the court properly refused to peremptorily instruct the jury to find for plaintiff on the question of statutory penalty even though plaintiff had testified that after he had warned defendant's workmen not to cross his line and deaden any timber on

his land, some of the trees had been poisoned, but made no showing of the kind or how many trees, if any, had been poisoned after the warning. *Strawbridge v. Day*, 232 Miss. 42, 98 So. 2d 122 (1957).

In an action against a minor and his parents for personal injuries arising out of a motor vehicle accident, where there was no proof that the father or mother authorized or knowingly permitted the minor to drive on the occasion in question, the trial court properly peremptorily instructed the jury to return a verdict for the parents. *Prewitt v. Walker*, 231 Miss. 860, 97 So. 2d 514 (1957).

Plaintiff was entitled to a peremptory instruction where it appeared that defendant, at the speed he was traveling, was following too closely to the car preceding him, which stopped, causing defendant to enter into the opposite lane of traffic and collide head-on with the truck in which plaintiff's decedent was riding, and defendant's negligence proximately caused the collision and death; and defendant could not invoke the sudden emergency rule since his own testimony showed that the emergency was caused by his own fault. *Meeks v. McBeath*, 231 Miss. 504, 95 So. 2d 791 (1957).

The trial court properly refused defendant a peremptory instruction where, in an action for a personal injury sustained when the truck in which plaintiff was a passenger was struck by defendant's automobile while undertaking to turn from the right lane of traffic across the oncoming traffic lane to enter a driveway, the jury was warranted in finding that the truck driver's movements were consistent with reasonable safety as required by Code 1942, § 8192, and that defendant's negligence was the contributing, if not the sole, cause of accident. *Hamilton v. McCry*, 229 Miss. 481, 91 So. 2d 564 (1956).

In an action of bastardy, where there was no substantial dispute as to the defendant being the father of the child, the court correctly granted a peremptory instruction for the mother. *Thomas v. Cook*, 229 Miss. 458, 91 So. 2d 275 (1956), motion overruled, 236 Miss. 365, 109 So. 2d 861 (1959).

Where defendant testified that when he had stopped prior to entering the through

street he had seen plaintiff's car approaching thereon at a distance of about 100 yards and traveling at about 40 miles per hour, but that he did not look any further before slowly driving onto the through street where the collision occurred, plaintiff was entitled to a peremptory instruction in his action for personal injuries sustained as a result of the collision. *Wells v. Bennett*, 229 Miss. 135, 90 So. 2d 199 (1956).

Where the insured had presented sufficient evidence, which together with the logical inferences therefrom, if taken to be true, would have substantiated his claim that he was suffering on account of paralysis agitans or Parkinson's disease, the court properly refused the insurer's motion for a peremptory instruction. *Brotherhood of R.R. Trainmen Ins. Dep't v. McLemore*, 228 Miss. 579, 89 So. 2d 629 (1956).

Motion for peremptory instruction to jury made at end of all testimony should not be sustained unless evidence of movant overwhelms by its weight proof of opposite party. *Wagley v. Colonial Baking Co.*, 208 Miss. 815, 45 So. 2d 717 (1950), error overruled, 46 So. 2d 925 (Miss. 1950).

In determining right of defendant to peremptory instruction to recover for death of customer allegedly caused by ptomaine poisoning, the court must assume as true everything which the evidence establishes either directly or by reasonable inferences which the jury might reasonably draw from such evidence, subject to the limitation, however, that a presumption cannot arise from another presumption. *Goodwin v. Misticos*, 207 Miss. 361, 42 So. 2d 397 (1949).

Where the evidence clearly showed that the deceased was beating the driver of an automobile at the time of an accident in which he was killed and evidence that the accident was due to another cause was speculative, a peremptory instruction in favor of an insurance company seeking to avoid payment of double indemnity should have been given. *Equitable Life Assurance Soc. of United States v. Mitchell*, 201 Miss. 696, 29 So. 2d 88 (1947).

Failure of the insured and his wife to reply to a letter from the insurer that the

insured was not the sole and unconditional owner of an automobile lost by theft and fire as contemplated by the policy did not entitle the insurer to a peremptory instruction where the letter left in doubt whether liability would be denied. *St. Paul Fire & Marine Ins. Co. v. Staten*, 200 Miss. 197, 26 So. 2d 538 (1946).

This statute [Code 1942, § 1530] which forbids judges to comment on the evidence or to give any charge unless requested by one of the parties, leaves unaffected the judicial authority to direct a verdict. *Jakup v. Lewis Grocer Co.*, 190 Miss. 444, 200 So. 597 (1941); *Perry v. Clarke*, 6 Miss. (5 Howard) 495 (1841).

Everything must be considered as proved which the evidence establishes either directly or by reasonable inference against party who asks peremptory instructions. *Dean v. Brannon*, 139 Miss. 312, 104 So. 173 (1925); *McKinnon v. Braddock*, 139 Miss. 424, 104 So. 154 (1925); *New Orleans & N.E.R. Co. v. Jackson*, 140 Miss. 375, 105 So. 770 (1925); *New Orleans & N.E.R. Co. v. Martin*, 140 Miss. 410, 105 So. 864 (1925); *Wise v. Peugh*, 140 Miss. 479, 106 So. 81 (1925); *Gulf & S.I.R.R. v. Hales*, 140 Miss. 829, 105 So. 458 (1925); *St. Louis & S.F. Ry. v. Nixon & Phillips*, 141 Miss. 677, 105 So. 478 (1925); *Yates v. Houston & Murray*, 141 Miss. 881, 106 So. 110 (1925); *Montgomery Ward & Co. v. Skinner*, 200 Miss. 44, 25 So. 2d 572 (1946); *Davidson v. McIntyre*, 202 Miss. 325, 32 So. 2d 150 (1947); *Triangle Amusement Co. v. Benigno*, 35 So. 2d 454 (Miss. 1948); *Thomas v. Mississippi Prods. Co.*, 208 Miss. 506, 44 So. 2d 556 (1950); *Allgood v. United Gas Corp.*, 204 Miss. 94, 37 So. 2d 12 (1948); *Bankston v. Dumont*, 205 Miss. 272, 38 So. 2d 721 (1949); *Wagley v. Colonial Baking Co.*, 208 Miss. 815, 45 So. 2d 717 (1950), suggestion of error overruled, 46 So. 2d 925 (Miss. 1950); *Stoner v. Colvin*, 236 Miss. 736, 110 So. 2d 920 (1959); *Statham v. Blaine*, 234 Miss. 649, 107 So. 2d 93 (1958), corrected, 234 Miss. 669, 108 So. 2d 213 (1959); *Priest v. Avent*, 236 Miss. 202, 109 So. 2d 643 (1959).

The court cannot direct verdict for either party when the evidence would authorize jury to find for the other. *Taylor v. Desoto Lumber Co.*, 137 Miss. 829, 102 So.

260 (1924), modified, 137 Miss. 843, 103 So. 82 (1925).

A case in which plaintiff was entitled to a peremptory instruction with reference to cotton sales and transactions. *Dillard & Coffin Co. v. Jennings*, 132 Miss. 370, 96 So. 307 (1923).

Where the proof of injury and the cause thereof is not certain and conclusive it is error for the court to direct a verdict. *Davis v. Day*, 127 Miss. 140, 89 So. 814 (1921).

A peremptory instruction should be given against plaintiff where the evidence shows he acquired the cause of action two days after bringing the suit. *St. Paul Fire & Marine Ins. Co. v. W.H. Daniel Auto Co.*, 121 Miss. 745, 83 So. 807 (1920).

In determining the propriety of a peremptory instruction the evidence is to be taken most strongly against him who asks it. *American Trading Co. v. Ingram-Day Lumber Co.*, 110 Miss. 31, 69 So. 707 (1915); *Triangle Amusement Co. v. Benigno*, 35 So. 2d 454 (Miss. 1948).

A case occurring within the state of Tennessee in which it held a directed verdict for defendant was error. *Turner v. Southern Ry. Co.*, 112 Miss. 359, 73 So. 62 (1916).

On a peremptory instruction being granted it is not essential that the jury retire but the verdict may be entered up without the jury's action. *Schaffer v. Deemer Mfg. Co.*, 108 Miss. 257, 66 So. 736 (1914); *Edwards v. Yazoo & Miss. V. Ry. Co.*, 112 Miss. 791, 73 So. 789 (1917), overruled on other grounds, *Hattiesburg Butane Gas Co. v. Griffin*, 206 So. 2d 845, 36 A.L.R. 3d 1108 (Miss. 1968).

If the evidence shows plaintiff entitled to recover on one item sued for he should have peremptory instruction as to such item. *McFadden v. Buckley*, 98 Miss. 28, 53 So. 351 (1910).

It is error to give peremptory instruction on a point on which the testimony is conflicting. *Romano v. Vicksburg R. & L. Co.*, 39 So. 781 (Miss. 1906); *T.B. Bonner Co. v. New Orleans & N.E.R.R.*, 40 So. 65 (Miss. 1906); *Elledge v. Gray*, 41 So. 2 (Miss. 1906); *Bell v. Southern R. Co.*, 94 Miss. 440, 49 So. 120 (1909); *Bryant v. Enochs Lumber & Mfg. Co.*, 94 Miss. 454, 49 So. 113 (1909); *Skipwith v. Mobile &*

O.R.R., 95 Miss. 50, 48 So. 964 (1909); Byers v. McDonald, 99 Miss. 42, 54 So. 664 (1910); Bolling v. Red Snapper Sauce Co., 97 Miss. 785, 53 So. 394 (1910); Dodge v. Cutrer, 101 Miss. 844, 58 So. 208 (1912); Hardy v. Masonic Beneficial Ass'n, 103 Miss. 108, 60 So. 48 (1912); Walker v. L.N. Dantzler Lumber Co., 103 Miss. 826, 60 So. 1013 (1913); Mobile & O.R. Co. v. Carpenter, 104 Miss. 706, 61 So. 693 (1913); Offutt v. Barrett, 106 Miss. 31, 63 So. 333 (1913); Waldrop & Thomas v. O.B. Crittenden & Co., 107 Miss. 595, 65 So. 644 (1914); National Life & Accident Ins. Co. v. De Vance, 110 Miss. 196, 70 So. 83 (1915); Jones v. Knotts, 110 Miss. 590, 70 So. 701 (1915); Wynnegar v. Southwestern Co., 120 Miss. 675, 83 So. 3 (1919); Buie v. Cloy, 127 Miss. 719, 90 So. 446 (1921); Brenard Mfg. Co. v. Baird, 141 Miss. 110, 106 So. 82 (1925); Yazoo & Miss. V. Ry. v. Lucken, 137 Miss. 572, 102 So. 393 (1925); Trotter v. Staggers, 201 Miss. 9, 28 So. 2d 237 (1946); Frederick Smith Enter. Co. v. Lucas, 204 Miss. 43, 36 So. 2d 812 (1948); Jackson City Lines v. Harkins, 204 Miss. 707, 38 So. 2d 102 (1948); Scoggins v. Vicksburg Hosp., 229 Miss. 770, 91 So. 2d 837, 70 A.L.R.2d 368 (1957); Walters v. Fine, 232 Miss. 494, 99 So. 2d 669 (1958); Ables v. Curle, 233 Miss. 369, 102 So. 2d 122 (1958).

Court may give peremptory instruction where no other verdict could reasonably have been allowed to stand. Wooten v. Mobile & O.R.R., 89 Miss. 322, 42 So. 131 (1906); Clark v. J.L. Moyse & Bro., 48 So. 721 (Miss. 1909); Fletcher v. Sovereign Camp, W.O.W., 81 Miss. 249, 32 So. 923 (1902).

A peremptory instruction will be error unless the evidence conceding it to be absolutely true discloses no legal right in the party against whom the instruction is given. Fore v. Alabama & V. Ry., 87 Miss. 211, 39 So. 493 (1905), error overruled, 87 Miss. 219, 39 So. 690 (1906).

A motion to exclude the evidence and instruct for defendant is analogous to a demurrer to the evidence, and in the main is governed by the same rules. Anderson v. Cumberland Tel. & Tel. Co., 86 Miss. 341, 38 So. 786 (1905).

A motion to exclude the evidence should never be allowed unless the same is

plainly and unmistakably insufficient to maintain the issue, nor except in cases where the court would feel constrained to set aside a verdict for the opposite party as unwarranted by the evidence. Anderson v. Cumberland Tel. & Tel. Co., 86 Miss. 341, 38 So. 786 (1905); Flora v. American Express Co., 92 Miss. 66, 45 So. 149 (1907); Illinois Cent. R.R. v. Fowler, 123 Miss. 826, 86 So. 460 (1920).

A peremptory instruction should not be given for the defendant if the state of the evidence is such that they would not vacate a verdict predicated thereon in plaintiff's favor. Rhymes v. Jackson Elec. R., L. & P. Co., 85 Miss. 140, 37 So. 708 (1904); Anderson v. Cumberland Tel. & Tel. Co., 86 Miss. 341, 38 So. 786 (1905).

18. Modification or withdrawal.

In a wrongful death action, error could not be predicated upon the fact that the trial judge had granted an instruction requested by appellants only after the appellants had been forced to amend the instruction to obviate an objection by the judge to the form in which it had been presented, the appellants' acceptance and use of the instruction as amended constituting a waiver of the error, if any, in the trial court's action is suggesting or requiring the amendment. McCollum v. Randolph, 220 So. 2d 310 (Miss. 1969).

Defendant cannot complain of a modified instruction as being erroneous where he used the instruction as modified on the trial. Holmes v. State, 192 Miss. 54, 4 So. 2d 540 (1941).

Judge may modify incorrect instructions presented to conform to law. Masonite Corp. v. Lochridge, 163 Miss. 364, 140 So. 223 (1932).

An instruction asked and modified by the court and read to the jury by the party requesting it cannot be complained of by said party. Louisville & N.R. Co. v. McCaskell, 98 Miss. 20, 53 So. 348 (1910).

A correct instruction requested and modified by the court may be complained of by a party asking it. Coleman v. Yazoo & Miss. V. Ry. Co., 90 Miss. 629, 43 So. 473 (1907).

19. Cure of error.

In a wrongful death action arising from a collision between a truck and the dece-

dent's automobile, the trial court's error in refusing a jury instruction that the defendant truck driver was negligent as a matter of law due to intoxication was cured by the jury finding in favor of the plaintiff. *Hasson v. Hale*, 555 So. 2d 1014 (Miss. 1990).

A jury instruction in a medical malpractice case stating that the jury was required to find that the defendant physician deviated from the standard of care required of him and that the deviation was the proximate cause of the plaintiff's injuries, was not defective for failure to include language requiring the jury to make their findings "from the evidence" where 5 other instructions stated that the jury was to make its findings based upon the evidence. *Hudson v. Taleff*, 546 So. 2d 359 (Miss. 1989).

Where vice, if any, in appellee's instruction to the jury was cured by the instructions obtained by the appellant, Supreme Court would overrule suggestion of error. *New Orleans & N.E.R. Co. v. Boliver*, 44 So. 2d 527 (Miss. 1950).

Refusal to grant instruction to which one is entitled is cured by granting of instruction of similar import. *Koestler v. Burton*, 207 Miss. 40, 41 So. 2d 362 (1949), overruled on other grounds, *Vascoe v. Ford*, 212 Miss. 370, 54 So. 2d 541 (1951).

In action against charity hospital, instruction of which emphasizes almost to exclusion of any other theory that issue involved is negligence of defendant's nurses is not cured by instruction for defendant based upon proper theory of liability which involves negligence in selection and employment of nurses when the inconsistency between instructions causes confusion. *International Order of Twelve of Knights & Daughters v. Barnes*, 204 Miss. 333, 37 So. 2d 487 (1948), overruled on other grounds, *Mississippi Baptist Hosp. v. Holmes*, 214 Miss. 906, 55 So. 2d 142 (1951).

Construction of all of the instructions as a whole will not cure an instruction that is contradictory of the other instructions and entirely contrary to the law. *Wallace v. Billups*, 203 Miss. 853, 33 So. 2d 819 (1948).

Instruction that if the jury were reasonably satisfied from a preponderance of the

evidence that the defendant committed the fraud complained of, verdict should be rendered for plaintiff was erroneous, and conflicting irreconcilable instruction, on behalf of defendant, that fraud must be shown by clear and convincing evidence, did not cure the error. *Hunt v. Sherrill*, 195 Miss. 688, 15 So. 2d 426 (1943).

An instruction contrary to the law of the case may not be cured by other instructions. *Alabama & V. Ry. Co. v. Cox*, 106 Miss. 33, 63 So. 334 (1913).

An instruction may be so defective as to constitute reversible error and cannot be cured by another instruction. *Mahaffey Co. v. Russell & Butler*, 100 Miss. 122, 54 So. 807 (1911); *Godfrey v. Meridian R. & L. Co.*, 101 Miss. 565, 58 So. 534 (1912).

Instruction in *res ipsa loquitur* case that burden was on defendant to rebut the presumption did not mislead jury when considered with other instructions charging that the burden of proof was upon plaintiff and that he must prove his allegations by a preponderance of the evidence. *Alabama & V. Ry. Co. v. Groome*, 97 Miss. 201, 52 So. 703 (1910).

A correct emphatic instruction for proponent of a will correct a slight error in another instruction given for contestants. *Hitt v. Terry*, 92 Miss. 671, 46 So. 829 (1908), overruled on other grounds, *Davion v. Williams*, 352 So. 2d 804 (Miss. 1977).

Error in instructions authorizing jury to assess the damages at whatever amount they might think plaintiff was entitled to receive, was not reversible where another instruction stated the matter correctly as entitling plaintiff only to such damages as testimony might warrant. *Mississippi Cent. R.R. v. Magee*, 93 Miss. 196, 46 So. 716 (1908).

An erroneous modification of an instruction may be cured by another instruction correctly stating the rule of law. *American Cent. Ins. Co. v. Antram*, 88 Miss. 518, 41 So. 257 (1906); *Hitt v. Terry*, 92 Miss. 671, 46 So. 829 (1908), overruled on other grounds, *Davion v. Williams*, 352 So. 2d 804 (Miss. 1977); *Mississippi Cent. R.R. v. Magee*, 93 Miss. 196, 46 So. 716 (1908); *Cumberland Tel. & Tel. Co. v. Jackson*, 95 Miss. 79, 48 So. 614 (1909); *Alabama & V. Ry. Co. v. Groome*, 97 Miss. 201, 52 So. 703

(1910); *Yazoo & Miss. V. Ry. v. Kelly*, 98 Miss. 367, 53 So. 779 (1910); *Southern R. Co. v. Ganong*, 99 Miss. 540, 55 So. 355 (1911); *Mississippi Cent. R.R. v. Pillows*, 101 Miss. 527, 58 So. 483 (1911).

20. Subject matter of instructions.

21. —Credibility of witnesses.

The trial court's instruction in an eminent domain case, that the landowner is a competent witness in his behalf and that the jury should consider his testimony along with all of the rest of the testimony in the case, constituted an improper comment on the weight of the evidence and invaded the province of the jury; the court's instruction, advising the jury that the opinion of experts as to values in eminent domain cases are "not to be passively received and blindly followed", denigrated the testimony of the expert witnesses in negative phraseology and was erroneous, particularly in view of the prior instruction in positive phraseology that the jury "should consider" the testimony of the landowner. *Mississippi State Hwy. Comm'n v. Robertson*, 350 So. 2d 1348 (Miss. 1977).

An instruction that if the jury should believe from the evidence that any witness who testified in the case was interested in the result of the suit as a party or otherwise, the jury, in determining the credit to be given such witness, might take into consideration such interest as the evidence showed the witness had, violated this section [Code 1942, § 1530], although under the circumstances, the error was harmless. *Hoxie v. Hadad*, 193 Miss. 896, 11 So. 2d 693 (1943).

Although the disability of a party from testifying because of his interest has been removed by statute, such statute does not justify an instruction to the jury in violation of this section. *Hoxie v. Hadad*, 193 Miss. 896, 11 So. 2d 693 (1943).

Instruction of *falsus in uno, falsus in omnibus*, while erroneous, will not constitute reversible error where no jury of fair, honest and reasonable men could have reached a different verdict. *Sikes v. Thomas*, 192 Miss. 647, 7 So. 2d 527 (1942).

Instruction that if jury believed from preponderance of the evidence that any witness had knowingly, wilfully and cor-

ruptly testified falsely as to any material facts in the case, then the jury might disregard the testimony of such witness entirely was erroneous. *Dixie Stock Yard, Inc. v. Ferguson*, 192 Miss. 166, 4 So. 2d 724 (1941).

Where there was sharp conflict between testimony of plaintiff and defendant's witness, refusing instruction regarding credit to be given any witness interested in result of suit as party or otherwise was error. *Yazoo & Miss. V. Ry. v. Alexander*, 182 Miss. 654, 179 So. 266 (1938).

Although the jury is the judge of the credibility of witnesses, courts will not permit verdict to stand where testimony of witnesses is arbitrarily disregarded by the jury. *Mobile, J. & K.C.R. Co. v. Jackson*, 92 Miss. 517, 46 So. 142 (1908).

An instruction is erroneous which advises the jury that they may reject the entire testimony of a witness who has sworn falsely in any particular without embodying the limitation that such false swearing must have been done wilfully, knowingly and corruptly. *Sardis & D.R. Co. v. McCoy*, 85 Miss. 391, 37 So. 706 (1905).

22. — Negligence, generally.

A jury instruction in a medical malpractice case which stated that a surgeon is not an insurer or guarantor of favorable results, and that the mere fact that a less than desirable result followed the defendant doctor's surgery did not, in itself, require the jury to find that the doctor was liable, was proper. *Hudson v. Taleff*, 546 So. 2d 359 (Miss. 1989).

A jury instruction in a negligence action arising from an automobile accident that required the defendant to "decrease her speed as may be necessary to avoid colliding with any person, vehicle, or other conveyance on the highway in compliance with legal requirements" was erroneous because it placed a higher burden on the defendant than that of reasonable care. Similarly, an instruction that required the defendant to be "vigilant and to anticipate the presence of vehicles at all times and under all circumstances" was erroneous for the same reason, and also warranted reversal and remand of the case. *Turner v. Turner*, 524 So. 2d 942 (Miss. 1988).

Plaintiff's instruction in wrongful death action that power company was required to maintain its lines in such a manner as to prevent it from being dangerous to the public, was incorrect for if it were required to do so, a power company would be an insurer against all injury to persons and property. *Mississippi Power & Light Co. v. Shepard*, 285 So. 2d 725, 82 A.L.R.3d 86 (Miss. 1973).

Instruction that the driver of a motor vehicle does not have the right to a clear and unobstructed highway, but must constantly keep the automobile being then and there driven by her under control, must continue on the alert, must keep a proper lookout ahead and anticipate the presence of other persons and vehicles upon the highway and must, at all times, drive her motor vehicle at such rate of speed to enable her to avoid injury to such person, when they come, or by the exercise of ordinary care, would come within her vision or under her observation, was reversible error. *Kimbrough v. L.B. Lampton Co.*, 283 So. 2d 599 (Miss. 1973).

Where a landowner alleged and presented testimony to the effect that a municipality was responsible for sewage invading his land where his cows consumed a quantity of the same resulting in the death of some of them, the landowner made out a case of absolute liability, and the allegation of negligence was surplusage and instructions which may not have adequately defined negligence or set forth acts or omissions constituting negligence were mere surplusage. *Town of Fulton v. Mize*, 274 So. 2d 129 (Miss. 1973).

In an automobile collision case, where there was evidence that the defendant had been speeding and driving while intoxicated, an instruction that liability rested not upon danger but upon negligence was reversible error, since such instruction could have allowed the jury to conclude that although it was dangerous to drive under the influence of intoxicants or at a high rate of speed, that did not mean that the defendant was negligent. *Freeze v. Taylor*, 257 So. 2d 509 (Miss. 1972).

An instruction stating that the jury could not return a verdict against the administratrix if it found that an automo-

bile collision resulted from the negligence of a person other than the deceased driver, but which did not designate any person other than that driver who might be charged with negligence, and did not state alleged acts of negligence, nor define them, was reversibly erroneous. *Knighton v. Knighton*, 253 So. 2d 846 (Miss. 1971).

In a personal injury suit, instructions which required the defendant overtaking motorist under all circumstances to be diligent and to anticipate the presence of others, and placing an absolute duty to pass safely and to avoid injury to others on such defendant, who collided with an oncoming motorist, were erroneous in placing a higher standard or care on the defendant than required by law and providing no factual guide for determining his negligence, since the standard of the law is reasonable care. *Acord v. Moore*, 243 So. 2d 55 (Miss. 1971).

When the plaintiff's automobile collided with the defendant's automobile which was stopped on the road as a result of an earlier accident caused by the defendant's negligence, the court properly denied an instruction requested by the defendant that the driver of plaintiff's automobile was guilty of negligence as a matter of law, which instruction was based on the common-law rule that the operator of a motor vehicle must drive at such a speed as to be able to stop within the range of his vision, the court noting that the "range of vision" rule was not a hard and fast rule which would preclude recovery in every case. *Huff v. Boyd*, 242 So. 2d 698 (Miss. 1971).

An instruction to the effect that the defendant driver, who claimed that he lost consciousness because of a stroke immediately before the accident, was required to prove that he had taken precautions to guard against the sudden onset of total physical disability was reversible error, where physicians testified that the defendant could not have foreseen the onset of a stroke. *Warren v. Pinnix*, 241 So. 2d 662 (Miss. 1970).

In a malpractice action arising out of the loss of a leg from clotting, the language of an instruction stating that liability must be based upon negligence "in connection with a transfusion procedure"

was sufficiently broad to include failing to observe or look at the leg, particularly in view of instructions stating that the patient could recover if it could be found that the doctor "failed to exercise reasonable care under the prevailing circumstances to observe the left leg" while administering the transfusion. *Chapman v. Carlson*, 240 So. 2d 263 (Miss. 1970).

In an action for injuries sustained in a collision which occurred when the defendant motorist was attempting to overtake the plaintiff motorcyclist, an instruction that if the defendant had a right to pass the plaintiff, and he was not speeding, he was not required by law to blow his horn unless the plaintiff was at the time giving a signal indicating his intention to turn from a straight path travel, was erroneous, where it was undisputed that at the time the defendant attempted to overtake the plaintiff the motorcycle was rapidly slowing down, since such activity of the motorcyclist would have indicated to a reasonable and prudent man situated in a following vehicle traveling at a rapid rate of speed that it was reasonably necessary to insure safe operation to give audible warning with his horn. *McHale v. Daniel*, 233 So. 2d 764 (Miss. 1970).

In an action for personal injuries, an instruction that the driver of a pickup truck, which ran over a motorcyclist after he had been thrown to the highway following a collision with the defendant's automobile, was negligent in the operation of his truck, and if the jury believed from a preponderance of the evidence that the negligence of the truckdriver contributed to the motorcyclist's injury, then the defendant was not responsible for such of the motorcyclist's injuries which were caused by the negligence of the truckdriver unless the jury should believe from a preponderance of the evidence that such negligence was foreseeable by the defendant, could not be construed as being in effect a peremptory instruction to find for the defendant. *Ratliff v. Nail*, 231 So. 2d 798 (Miss. 1970).

In an action against a garage and a tire company for personal injuries and property damage resulting when a wheel came off, an instruction to the effect that the fact that an accident occurred and the

plaintiff was injured constituted no evidence whatever of any negligence on the part of the defendants was improper as removing the circumstance or fact of the accident from consideration by the jury. *Bigelow v. Sports Cars, Ltd.*, 221 So. 2d 108 (Miss. 1969).

In an action against a contractor by his laborer for injuries sustained during the construction of a chicken house, a jury instruction to the effect that the jury should find for the laborer if the contractor saw the laborer standing against the wall of the chicken house and failed to stop the truck and continued to back the truck until it pinned the laborer against the wall resulting in bodily injuries to the laborer, was properly given. *Smith v. Jones*, 220 So. 2d 829 (Miss. 1969).

In an action arising from a train-automobile collision, an instruction to the effect that the engineer operating the train had no right under the law to run it across the intersection in question at a greater rate of speed than was reasonably prudent or careful at the time, taking into consideration all of the facts and circumstances, was not erroneous for failing to give the jury any guide to what was a reasonable or prudent rate of speed, where the facts were sufficient to warrant the jury in finding that the intersection was unusually hazardous and that the speed of 52 miles an hour at which the train was proceeding through a town was not a reasonable and prudent rate of speed. *Illinois Cent. R.R. v. Pilgrim*, 220 So. 2d 598 (Miss. 1969).

An instruction in an automobile accident case that the operator of a vehicle must at all times drive his motor vehicle at such a rate of speed and in such a manner as to enable him to avoid injury to anyone who might come within the vision of the operator, was subject to criticism in that it virtually made the operator absolutely liable to anyone under any circumstances for any injury occasioned by the use of the vehicle, when the proper standard is the exercise of ordinary care on the part of the automobile driver to observe persons or objects within his traffic lane or in close proximity, and to avoid injury to persons or property within his vision or under his observation. *Stewart v. White*, 220 So. 2d 271 (Miss. 1969).

An instruction that a motorist operating his vehicle on a county road had an absolute duty, before turning across the road into the opposite lane of traffic to use reasonable care to determine if any other vehicles were occupying the opposite lane improperly qualified the word "duty" by the word "absolute." *Niles v. Sanders*, 218 So. 2d 428 (Miss. 1969).

Court's instruction for plaintiff that it was the duty of the driver of defendant's truck at all times to maintain a reasonably safe and proper distance between his vehicle and any vehicle proceeding in front of his truck, that it was his duty to anticipate that preceding vehicles would slow or would stop on the highway, and that it was his duty to keep the truck under reasonable control at all times and to take reasonable precautions commensurate with the type of vehicle and load thereon, imposed no absolute liability on the truckdriver for the consequences of his actions. *Bill Hunter Truck Lines v. Jernigan*, 384 F.2d 361 (5th Cir. 1967).

An instruction that the operator of a vehicle continuing its course is bound to have his vehicle under such control that another vehicle, entering the intersection first, can safely make the left turn, is improper as making such operator the insurer of the other's safety without regard to whether such other had at the time a right to turn across the traffic lane, and without regard to whether or not he was in such close proximity to the intersection as to constitute an immediate hazard. *Greenville Ice & Coal Co. v. Brown*, 236 Miss. 253, 109 So. 2d 858 (1959).

An instruction that the driver of an oncoming truck who saw a car signalling at a controlled-traffic intersection for a left turn but continued on a green light was bound to know that the car's driver contemplated turning, is objectionable as ignoring whatever right the truck driver had to assume that the car would wait until the traffic lane was clear. *Greenville Ice & Coal Co. v. Brown*, 236 Miss. 253, 109 So. 2d 858 (1959).

In a malpractice action, an instruction which announced the rule as to the standards of skill and care required of physicians and surgeons, and further told a jury that if they believed from a prepon-

derance of the testimony that the defendant failed to use and exercise such reasonable and ordinary care, skill and diligence in diagnosing, treating and operating on the plaintiff, and that the plaintiff was injured and damaged thereby, she was entitled to recover, was approved. *Copeland v. Robertson*, 236 Miss. 95, 108 So. 2d 419 (1959), overruled on other grounds, *Hilbun*, 466 So. 2d 856 (Miss. 1985).

An instruction calling for a court ruling that the driver of a truck which struck a car ahead, halted by a traffic light, when the brakes failed to hold, was negligent as a matter of law, is properly refused as lacking the qualification that the failure of the brakes must have been attributable to negligence. *Phillips v. Delta Motor Lines*, 235 Miss. 1, 108 So. 2d 409 (1959).

An instruction that motorist in determining whether he could turn left with reasonable safety, may assume that another is approaching at a lawful speed, is defective in failing to inform jury that motorist could indulge in the assumption only until he knew, or should have known in the exercise of reasonable care, that the speed of the oncoming car was such that the turn could not be safely made. *Cothorn v. Brewer*, 234 Miss. 676, 107 So. 2d 361 (1958).

Instruction as to the duty of a motorist to anticipate the presence on a highway of other persons and vehicles, approved. *Williams v. Moses*, 234 Miss. 453, 106 So. 2d 45 (1958).

In an action for damages resulting when defendant's truck-trailer unit ran into the rear end of plaintiff's truck-trailer unit on the curved portion of the highway, the court did not err in refusing to charge the defendant's driver with negligence in respect to speeding, overtaking on the right, and following too closely, particularly in view of Code 1942, § 1455. *Green Truck Lines v. Hooper*, 233 Miss. 794, 103 So. 2d 443 (1958).

In an action for injuries sustained by 16-year-old motorcyclist in an intersectional collision with a truck, the driver of which had, contrary to Code 1942, § 8189(a), and a city ordinance, "cut the corner" in making a left turn, instructions permitting the jury to find that the motor-

cycle had already entered the intersection at the time of the left turn, and was readily visible to the truck driver, was not reversible error, where, under conflicting evidence, the jury could and evidently did, reject the version of defendant's witnesses. *City of Jackson v. Reed*, 233 Miss. 304, 103 So. 2d 6 (1958), overruled on other grounds, *City of Jackson v. Williamson*, 1999 Miss. Lexis 89 (Miss. Feb. 25, 1999).

In an action for personal injuries and property damages resulting from an intersectional collision, plaintiff's tendered instruction that every operator of an automobile had the right to assume and to act upon the assumption that persons driving other vehicles would exercise ordinary care and caution in traveling the streets, was properly refused as incomplete since it did not state that the plaintiff could rely upon the assumption that the defendant would exercise ordinary care and caution as she approached the intersection only until plaintiff knew or should have known in the exercise of ordinary care that defendant was not going to slow down or stop. *Dame v. Estes*, 233 Miss. 315, 101 So. 2d 644 (1958).

An instruction that the law did not countenance blind reliance upon an automobile operator, approaching a stop sign, observing it, so, even if plaintiff was driving his automobile on a though street protected by stop signs, he did not have an unqualified privilege in the right of way, and was under a duty to observe due care in approaching and traversing the intersection, placed undue emphasis on plaintiff's duty to observe due care to avoid the collision and practically relieved the defendant from any duty to exercise due care at the intersection. *Dame v. Estes*, 233 Miss. 315, 101 So. 2d 644 (1958).

In an action by property owners against the city, the court properly submitted to the jury the issue as to whether or not the city negligently caused or permitted the accumulation of sand and debris to the extent that it interfered with the natural flow of water and thus caused it to overflow and damage the plaintiff's property. *City of Meridian v. Bryant*, 232 Miss. 892, 100 So. 2d 860 (1958).

In view of the uncontradicted evidence that when the motorist first saw the taxi-

cab it had stopped and its headlights and taillights were burning, the trial court erred in submitting to the jury the issue of the alleged negligence of the taxicab driver in stopping upon the highway without giving any warning by hand signals, arm signals, blinker lights or other signals. *Snowden v. Skipper*, 230 Miss. 684, 93 So. 2d 834 (1957).

In an action by plaintiff for injuries sustained in an intersectional automobile collision, the trial court correctly refused to instruct as to the duty of the defendant to turn to his right and avoid the collision, and to proclaim defendant's liability if the collision occurred east of the center line of the highway, where the evidence as to whether there was ample room upon the highway for defendant to have made a turn so as to have avoided the accident was conflicting, and defendant's evidence showed that he was on the right side of the highway at the time of the accident. *Moore v. Herman Guy Auto Parts, Inc.*, 230 Miss. 189, 92 So. 2d 373 (1957).

Trial court did not err in refusing to give an instruction that would have required a holding that defendant, who was traveling along a through highway, was guilty of negligence as a matter of law where the jury could have found that when plaintiff had entered the intersection, defendant was so close at hand that defendant could not possibly have stopped or averted the collision. *Walton v. Owens*, 244 F.2d 383 (5th Cir. 1957), reh'g denied, 249 F.2d 314 (5th Cir. 1957).

Instructions in suit to recover for injuries sustained by defendant's employee that defendant owned its employee the nondelegable duty to exercise reasonable or ordinary care to furnish him with a reasonably safe place in which to work and with reasonably safe appliances upon and about which to work, though abstract, was not objectionable. *Johns-Manville Prods. Corp. v. McClure*, 46 So. 2d 539 (Miss. 1950).

In action for damages to automobile arising out of ramming by truck from rear, instruction that burden of proof is upon plaintiff to prove defendant was negligent "in the manner charged in the declaration," is erroneous because referring jurors to declaration for hypothesis upon

which to rely, but not cause for reversal of case when other instructions, not in conflict therewith, are granted which incorporate in them the absent hypothesis omitted from this erroneous instruction. *Wilburn v. Gordon*, 209 Miss. 27, 45 So. 2d 844 (1950).

In an action for damages caused by the collapse of a building, the plaintiff is entitled to an instruction that mere proof of the collapse places a burden on the owner to make some explanation. *Bloch v. Brown*, 201 Miss. 653, 29 So. 2d 665, 173 A.L.R. 874 (1947).

When negligence is the subject of the action, the instructions must confine the verdict to the ground or grounds of negligence alleged and in support of which there has been substantial proof. *New Orleans & N.E.R. Co. v. Miles*, 197 Miss. 846, 20 So. 2d 657 (1945).

An instruction allowing jury to find negligence without giving a guide as to what specific acts or omissions within the pleadings and proof are sufficient to constitute actionable negligence, is erroneous. *New Orleans & N.E.R. Co. v. Miles*, 197 Miss. 846, 20 So. 2d 657 (1945).

An instruction on negligence of employees of a railroad company may be made in general terms with reference to employees. *St. Louis & S.F. Ry. v. Ault*, 101 Miss. 341, 58 So. 102 (1912).

23. —Contributory negligence.

When a comparative negligence instruction is given, the jury should be instructed as to an alternative format for the rendering of a comparative negligence verdict which provides for an apportionment of fault or damages if both parties are found to be negligent. *Burton ex rel. Bradford v. Barnett*, 615 So. 2d 580 (Miss. 1993).

In a wrongful death action arising from a collision between a truck and the decedent's automobile, the trial court erred in granting a comparative negligence instruction where the only act of negligence claimed by the defendant truck driver was that the decedent drove her car onto his side of the highway since, if the jury had found the decedent negligent in driving onto the wrong side of the road, they would have been duty bound to find for the defendant. *Hasson v. Hale*, 555 So. 2d 1014 (Miss. 1990).

In an action arising out of an intersection accident, it was error to grant the defendant a comparative negligence instruction, based on the defendant's contention that the plaintiff was traveling at an excessive rate of speed at the intersection, where it was evident that the sole proximate cause of the collision was that the defendant ran a red light. *Biddy v. State*, 246 So. 2d 94 (Miss. 1971).

An instruction given under the comparative negligence statute which does not define or set out any act which would constitute negligence on the part of either the plaintiff or the defendant is erroneous as a roving instruction and constitutes reversible error unless there is some other instruction which furnishes the jury a guide to the facts which would constitute negligence. *Rayborn v. Freeman*, 209 So. 2d 193 (Miss. 1968).

To instruct the jury for the plaintiff in an automobile collision action that the jury could not find him guilty of contributory negligence because of the comparative negligence statute was error. *Whitten v. Land*, 188 So. 2d 246 (Miss. 1966).

In action for damages to automobile arising out of ramming by truck, instruction that even if jury believed from preponderance of evidence that defendant was guilty of negligence, jury also believed that plaintiff was negligent, jury should find for defendant or diminish plaintiff's actual damages in such proportion as plaintiff's negligence may have contributed to accident is erroneous and should not have been given. *Wilburn v. Gordon*, 209 Miss. 27, 45 So. 2d 844 (1950).

In action for damages to automobile arising out of ramming by truck, instruction that if jury believed from evidence that plaintiff and defendant were equally negligent, jury should find for defendant, is erroneous, for if both were negligent equally, defendant would not be absolved from liability altogether, but plaintiff's damages would be reduced by fifty per cent. *Wilburn v. Gordon*, 209 Miss. 27, 45 So. 2d 844 (1950).

The driver of an automobile, the windshield of which was covered with snow except for a small place which provided only vision straight ahead, who stopped before going onto a highway and then

proceeded was not entitled to an instruction on contributory negligence of the driver of a vehicle traveling the highway who sounded his horn within 300 feet of the intersection upon seeing the stopped car. *Trewolla v. Garrett*, 200 Miss. 563, 27 So. 2d 887 (1946).

An instruction allegedly ignoring the possibility of contributory negligence is not erroneous if neither party requested instructions on that point. *Murphy v. Burney*, 27 So. 2d 773 (Miss. 1946).

A charge given sufficiently covering the law of comparative negligence justifies a refusal to give another on the same point. *Illinois Cent. R.R. v. Nixon*, 109 Miss. 308, 68 So. 466 (1915).

The court cannot limit recovery on account of contributory negligence, where neither party requests such instruction. *Yazoo & Miss. V.R.R. v. Messina*, 109 Miss. 143, 67 So. 963 (1915), *rev'd*, 240 U.S. 395, 36 S. Ct. 368, 60 L. Ed. 709 (1916).

Where neither party has requested an instruction with reference to diminishing damages on account of contributory negligence the plaintiff cannot complain at the failure of the court to give such instructions thereon. *Lindsey Wagon Co. v. Nix*, 108 Miss. 814, 67 So. 459 (1915).

A case in which an instruction should have been given with reference to contributory negligence reducing damages sustained. *Illinois Cent. R.R. v. Handy*, 108 Miss. 421, 66 So. 783 (1914).

Unless defendant is guilty of gross negligence mere contributory negligence will not prevent recovery. *Yazoo & Miss. V. Ry. v. Carroll*, 103 Miss. 830, 60 So. 1013 (1913).

An instruction restricting a defense to contributory negligence held erroneous in that it withdrew from the jury the defense of due care and precaution on the part of the defendant. *Yazoo & Miss. V. Ry. v. Bruce*, 98 Miss. 727, 54 So. 241 (1911).

The jury must determine the question of contributory negligence of a child from his intelligence, age, knowledge and experience and it is error to restrict them to his intelligence. *Potera v. City of Brookhaven*, 95 Miss. 774, 49 So. 617 (1909).

Where in an action for injuries, plaintiff's evidence and all just inferences to be drawn therefrom show that his own neg-

ligence contributed to produce the injury, it is the duty of the court, though the defendant introduces no proof to support a plea of contributory negligence, to instruct the jury, as a matter of law, that plaintiff cannot recover. *Bridges v. Jackson Elec. Ry., Light & Power Co.*, 86 Miss. 584, 38 So. 788, 4 Am. Ann. Cas. 662 (1905).

24. —Proximate cause.

In a passenger action for injuries sustained in an automobile accident, an instruction to the effect that the jury might not return a verdict against the administratrix of the deceased driver if it should find from the evidence that the collision in question resulted solely, directly, and proximately from the negligence of a person other than the deceased driver was erroneously granted, since it did not designate any person other than the driver who might be charged with negligence, nor state the alleged acts of negligence, nor define them, leaving the jury to grope without direction for some unnamed person, guilty of some unexplained action which the jury might in its own fashion consider to be negligence. *Dempsey v. Knighton*, 244 So. 2d 721 (Miss. 1971).

Where the defendant's disabled vehicle was in the highway as a result of an earlier collision caused by his negligence, and he had made no attempt to move it or warn oncoming traffic of its presence, an instruction for the plaintiff that the defendant's failure to remove or attempt to remove his automobile from the highway or to warn oncoming automobiles constituted negligence proximately causing or contributing to the automobile accident in question was properly allowed. *Huff v. Boyd*, 242 So. 2d 698 (Miss. 1971).

In an automobile passenger's action for injuries, an instruction that if the jury should believe from a preponderance of the evidence that certain facts were true, then it could infer that the driver of the automobile was negligent and if such negligence proximately contributed to the accident then it should find for the plaintiff, should not have been given since the case was an inappropriate one for the application of the doctrine of *res ipsa loquitur*, but the instruction was not harmful to the defendant where the undisputed testimony and the physical facts overwhelm-

ingly showed that the driver was negligent. *Martin v. Capitol Broadcasting Co.*, 233 So. 2d 217 (Miss. 1970).

In an action brought for the alleged wrongful death of a minor bicyclist, an instruction granted defendant motorist to the effect that in event the jury found that no negligence on defendant's part had proximately caused or contributed to bicyclist's death, the occurrence insofar as defendant was concerned was an unavoidable accident for which he was not liable, did not incorrectly state the applicable law. *McCullum v. Randolph*, 220 So. 2d 310 (Miss. 1969).

In a pedestrian's action for injuries sustained when he was struck by an automobile as he crossed a street, an instruction was erroneous which permitted the jury to rove the entire field of automobile negligence without regard to whether the negligence it might seize upon for a verdict was a proximate cause of the accident sued upon. *Stewart v. White*, 220 So. 2d 271 (Miss. 1969).

An instruction which simply instructs the jury that if it believes from a preponderance of the evidence that defendant was negligent and his negligence was the proximate cause of the accident, the jury should find for the appellee, is fatally erroneous, for it wholly fails to designate what constitutes negligence so that the jury has no criteria by which it could determine whether or not the appellant was negligent. *Mills v. Balus*, 254 Miss. 353, 180 So. 2d 914 (1965); *Bush Constr. Co. v. Walters*, 254 Miss. 266, 179 So. 2d 188 (1965).

An instruction for the defendant in a wrongful death action that if the jury believes from the evidence that the injury and subsequent death of the plaintiff was proximately caused by the negligence, if any, of the plaintiff, then the jury should return a verdict for the defendant, is an erroneous instruction and in conflict with that provision of Code 1942, § 1454. *Hogan v. Cunningham*, 252 Miss. 216, 172 So. 2d 408 (1965).

An instruction in a case which the driver was confronted with an emergency, that it was the driver's duty to keep truck under reasonable control considering nature of highway and existing circum-

stances, and that failure to do so, if a proximate cause of collision, warranted a verdict for the other party, held in error. *Summers v. Johnson*, 236 Miss. 826, 105 So. 2d 451 (1958).

An instruction that the driver of an automobile about to enter the highway from a private driveway must give the right of way to all vehicles approaching so closely on the highway as to constitute an immediate hazard, and, if the defendant negligently entered the highway from a private driveway at the time when plaintiff was approaching so closely as to constitute a hazard, and negligently failed to yield the right of way to the plaintiff, and such negligence, if any, proximately caused or contributed to the collision and to the damages, the jury should find for the plaintiff, properly presented the issues to the jury. *Stewart v. Madden*, 233 Miss. 206, 101 So. 2d 353 (1958).

Where a motorist had approached an intersection with signal lights flashing red in her direction, and failed to stop before entering the intersection, the court properly submitted to the jury the issue as to whether such negligence was a sole cause of the collision. *Bates v. Walker*, 232 Miss. 804, 100 So. 2d 611 (1958).

An instruction that if the driver of the car in which the plaintiff was riding negligently attempted to pass the defendant's vehicle within 100 feet of an intersection, and such negligence was the sole proximate cause of the accident, the jury could find for the defendant, was correct, where the defendant's proof showed that the attempt to pass was made within 50 or 60 feet of the intersection, and the intersection involved was one coming within the contemplation of the statute. *Clark v. Mask*, 232 Miss. 65, 98 So. 2d 467 (1957).

The trial court committed reversible error in instructing that the driver of the car in which plaintiff was riding was guilty of negligence in driving his car into the intersection of a through highway without looking to the north immediately before doing so, and that judgment should be for defendants if such negligence were the proximate cause of the collision, where both plaintiff and the driver had testified that before entering the intersection they had looked both to the north and to the

south. *Moore v. Herman Guy Auto Parts, Inc.*, 230 Miss. 189, 92 So. 2d 373 (1957).

Trial court's instruction that the uncontradicted proof showed that the truck owned and operated by the defendant was not equipped with clearance lights and sidemarker lights and reflectors as required by law, and that such failure to have the truck equipped was negligence on the part of the defendants, and that if such negligence proximately contributed to the collision, the jury should find for plaintiff, was not error, even though it may have had the effect of prejudicing the jury as against the defendants, since established facts can properly be assumed in the instruction. *Arnold v. Reece*, 229 Miss. 862, 92 So. 2d 237 (1957).

Instruction that defendant driver was negligent in cutting corner of intersection and in failing to be on lookout in entering intersection so that jury should find for plaintiff motorist if they believed such negligence to be the proximate cause of a collision was improperly refused where there was nothing to prevent the two drivers from seeing the other's vehicle. *Robinson v. Colotta*, 199 Miss. 800, 26 So. 2d 66 (1946).

25. —Assumption of risk.

An instruction as to assumption of the risk, which failed to include the essential requirements that the plaintiff passenger must have known and appreciated the risk before assuming it, was prejudicially erroneous. *Knighton v. Knighton*, 253 So. 2d 846 (Miss. 1971).

In a passenger action for injuries sustained in an automobile accident, an assumption of the risk instruction that if the jury should believe that the driver on the occasion in question was under the influence of intoxicating alcohol or beer, that the passenger plaintiff assumed the risk of riding in the vehicle, was prejudicially erroneous where there was at most only a possible inference that the driver of the automobile was intoxicated, and where the instruction omitted the essential requirement that a person must know and appreciate a risk before he can assume it. *Dempsey v. Knighton*, 244 So. 2d 721 (Miss. 1971).

In an action by an automobile passenger for personal injuries, an instruction

that if the plaintiff voluntarily or knowingly placed himself in defendant's automobile when the defendant was intoxicated to the extent that it was an unsafe venture for the plaintiff, then the plaintiff assumed the risk embraced in the defendant's intoxicated condition was erroneous in failing to state that the plaintiff must know and understand the risk he is incurring and the plaintiff's choice to incur the risk must be free and voluntary. *Griffin v. Holliday*, 233 So. 2d 820 (Miss. 1970).

In an action against a contractor by his laborer for injuries sustained during the construction of a chicken house when the contractor backed a truck into the laborer, an instruction that if the jury should find that the plaintiff laborer voluntarily and knowingly placed himself in a position of danger, then the plaintiff assumed the risk of injury and could not recover, was properly refused because the doctrine of assumption of the risk is not in force as between a master and servant. *Smith v. Jones*, 220 So. 2d 829 (Miss. 1969).

An instruction in an action by one who slipped on a wet floor in a store entrance that plaintiff assumed such risks as were obvious to a person of ordinary intelligence, and that if plaintiff saw, knew and appreciated the danger, or should have done so by the exercise of reasonable care, the finding should be for the defendant, is erroneous as eliminating the distinction between assumption of risk and contributory negligence and as denying the jury's right to weigh the respective negligence, if any, of the parties. *Wallace v. J.C. Penney Co.*, 236 Miss. 367, 109 So. 2d 876 (1959).

In employee's suit against employer for personal injuries where evidence disclosed that injury resulted from negligence of fellow servants brought about by the direct order of the foreman, instruction eliminating entirely the question of whether the negligent order of the foreman was either the proximate cause or a contributing cause to the accident and injury, and tending to mislead the jury to apply the doctrine of assumption of risk, and to use contributory negligence as a complete bar to the action was error. *Oakes v. Mohon*, 208 Miss. 478, 44 So. 2d 551 (1950).

26. —Sudden emergency.

Evidence that the decedent, after weaving back and forth over the centerline while proceeding southward, got into the northbound lane, and that the defendant, going northward, attempted to go into the southbound lane to avoid a collision but the decedent drove head on into the front of the defendant's vehicle, indicated that the defendant was confronted with a sudden emergency not of his making in which he was called on to take quick action in a hazardous situation, and justified the giving of the sudden emergency instruction as to the reduced standard of care required of a motorist in such a situation. *Graves v. Hart's Bakery, Inc.*, 241 So. 2d 673 (Miss. 1970).

In an action for injuries sustained in a three vehicle collision, it was error to instruct the jury on the sudden emergency doctrine with respect to the defendant motorist, where it was shown that just before striking the plaintiff's vehicle, the defendant had been following behind at a distance of only 36 feet while traveling 45 miles per hour in violation of Code 1942, § 8188. *Dailey v. Acme Fin. Corp.*, 234 So. 2d 902 (Miss. 1970).

In an action for injuries sustained in a three vehicle collision, the giving of an instruction on the sudden emergency doctrine when it was shown that the motorist with respect to whom the instruction was given had, prior to striking the vehicle from the rear, observed the brakelights of vehicles ahead but continued to proceed at 50 miles per hour as he entered the westbound lane to pass, and had applied his brakes only when the vehicle ahead of him bounced across the center line after striking the vehicle in front of it, and thus had a substantial role in creating the circumstances which he maintained constituted an emergency. *Dailey v. Acme Fin. Corp.*, 234 So. 2d 902 (Miss. 1970).

In a suit for the death of a child who had run into the street from behind a parked truck and had been struck by the defendant's automobile, the jury was properly instructed that a person confronted with a sudden emergency not of his own making is held only to the degree of care of a reasonable and prudent man in such emergency. *Young v. Schwarz*, 230 So. 2d 583 (Miss. 1970).

An instruction as to the liability of a motorist to a pedestrian who unexpectedly walks in front of his car is not proper in a case in which the pedestrian had almost completed the crossing of a three-lane highway and was within 3 feet of the curb. *Williams v. Moses*, 234 Miss. 453, 106 So. 2d 45 (1958).

In an action against the driver by a share-the-expense guest for injuries allegedly sustained when the automobile's foot brake failed to function properly resulting in the driver's automobile colliding into the rear of another automobile that had come to a stop, a sudden emergency instruction was erroneous which omitted any reference to the defendant's duty after the emergency arose to exercise such care as a reasonably prudent and capable driver would use under the unusual circumstances. *Moore v. Taggart*, 233 Miss. 389, 102 So. 2d 333 (1958).

27. —Damages; amount of recovery.

An instruction on present net cash value of lost earnings is appropriate where there is evidence to support it. If the defendant wishes the jury instructed on such matters, it is incumbent upon him or her to specifically request it, either by an instruction on his or her own, or by being added to one of the plaintiff's instructions. In the absence of specifically calling the matter to the attention of the circuit judge and tendering a requested instruction embracing this issue, any error is waived. *Young v. Robinson*, 538 So. 2d 781 (Miss. 1989).

A trial court in a personal injury action committed reversible error in refusing a requested jury instruction stating that an award for damages would not be subject to any income taxes and such taxes should not be considered in fixing the amount of the award. *Seaboard Sys. R.R. v. Cantrell*, 520 So. 2d 479 (Miss. 1987).

Instructions in personal injury action which not only authorized the jury to take into consideration the decreased purchasing power of the dollar, but also to consider the increased costs of living, were calculated to encourage the jury to increase the damages based on matters aliunde of the record. *Atwood v. Lever*, 274 So. 2d 146 (Miss. 1973).

In an action on a policy to recover for the death of a horse, a judgment in the plaintiff's favor would be reversed as to amount of liability, where by its terms the policy was to cover the actual cash value of the horse, not to exceed \$4,000, and the evidence was conflicting as to the actual value, but the jury was instructed that if it should find for the plaintiff it should assess damages in the amount of \$3,000 and the jury did return a verdict in that amount. *St. Louis Fire & Marine Ins. Co. v. Lewis*, 230 So. 2d 580 (Miss. 1970).

In a suit for recovery under a wind and rainstorm policy, an instruction that if the insureds' roof was damaged by wind so that rain entered the house, it was insureds' duty to mitigate damages by using reasonable diligence to have the damages remedied, was erroneously refused in view of evidence that after the roof was damaged the insureds allowed the roof to remain damaged for two years, thereby allowing additional damages to the exterior and the interior of the house. *White v. Pascagoula Civil Serv. Comm'n*, 222 So. 2d 131 (Miss. 1969).

In a suit for damages for personal injuries, an instruction to the effect that the plaintiff could not prevail unless he proved by the preponderance of evidence that he sustained all of the injuries described in his declaration and that such injuries produced all of the claimed results, was erroneous and could, together with pictures taken during a surveillance of the plaintiff two weeks before trial, mislead the jury, where the case was tried nearly 18 months after the accident. *Price v. Hearin-Miller Transporters, Inc.*, 220 So. 2d 813 (Miss. 1969).

An instruction for the plaintiff, the condemnor of a right of way for a utility easement, that the public use to which the lands of the defendant are to be put is that of a right-of-way easement over and across the land and is not a fee simple taking, and that in arriving at the verdict as to the amount of damages the jury should take into consideration the fact that the taking is for a limited purpose, leaving the defendant right to use the land in a manner not inconsistent with the easement, was properly refused for the reason that it would have singled out

a factor tending to reduce damages. *Mississippi Power Co. v. Head*, 218 So. 2d 24 (Miss. 1968).

In an action for damages resulting to plaintiffs' property, allegedly resulting from a fill placed by a railroad company upon its land and the edge of plaintiffs' lot, which caused the discharge upon plaintiffs' tract of excess surface waters, the sole instruction on damages which told the jury that plaintiffs were not required to prove their damages with mathematical exactness, but that it could take into consideration all the evidence touching the extent, kind and character of the injuries and damages sustained, if any, by the plaintiffs, and from such evidence fix the amount of the damages, if any, failed to furnish the jury with any guide pertaining to the well-established rule of measurement of damages in surface water cases, and was erroneous. *Alabama G.S.R.R. v. Broach*, 238 Miss. 618, 119 So. 2d 923 (1960).

An instruction in a trespass action that plaintiff, if successful should be compensated for damage to his fences, for harassment and inconvenience and necessary labor to rebuild fences, and his trips and expenses to see defendant regarding such trespasses, and such monetary value as will compensate him for the inconvenience and labor caused by the trespasses, is objectionable as pyramiding damages and permitting punitive damages without proper qualification. *Day v. Hamilton*, 237 Miss. 472, 115 So. 2d 300 (1959).

Instructing jury in death action that they may consider the present net cash value of deceased's life at the time of death is not error. *Ashcraft v. Alford*, 236 Miss. 25, 109 So. 2d 343 (1959).

In a malpractice action, an instruction was approved which stated that if the jury found for plaintiff they should fix the amount of damages at such sum as would be fair and reasonable compensation for plaintiff's injuries proximately resulting from defendant's negligence, if any, and could give consideration to hospital bills, doctor bills, past, present and future pain and suffering, permanent disfigurement, humiliation and embarrassment, and impairment of earning capacity, if any, in each instance. *Copeland v. Robertson*, 236

Miss. 95, 108 So. 2d 419 (1959), overruled on other grounds, *Hall v. Hilbun*, 466 So. 2d 856 (Miss. 1985).

In a proceeding to condemn land for the construction of a cloverleaf at the intersection of certain highways, which had not been limited access highways, an instruction that the Highway Commission could construct the interchange on its right of way without payment of damages to an abutting property owner was erroneous, where the construction included a high embankment near the owner's land, and the commission had revoked the owner's permit to enter the highway directly, so that his right of access to the highway was impaired. *Carney v. Mississippi State Hwy. Comm'n*, 233 Miss. 598, 103 So. 2d 413 (1958).

In a proceeding to condemn land for the construction of a cloverleaf at the intersection of certain highways, which had not been limited access highways, an instruction that abutting landowner was not entitled to damages resulting solely from inconvenience in entering and leaving his remaining property, provided that the public at large suffered the same inconvenience, was erroneous. *Carney v. Mississippi State Hwy. Comm'n*, 233 Miss. 598, 103 So. 2d 413 (1958).

In an action by a seller for the unpaid balance of a note given by the purchaser as part payment of a hay baler, purchaser's instructions authorizing the jury to deduct all damages suffered by the purchaser from the use of the machine, and which told the jury that if the purchaser was damaged in a sum equal to the balance alleged to be due under the contract, it should find for the defendant, was erroneous as failing to submit to the jury any proper measures of damages for a breach of warranty by the seller. *Delta Motors, Inc. v. Childs*, 233 Miss. 125, 101 So. 2d 527 (1958).

In an action by a seller for the unpaid balance on a note given by the purchaser as part payment for a hay baler, wherein the purchaser defended upon the ground of a breach of warranty on the part of the seller, an instruction that told the jury to find for the purchaser unless it believed that the purchaser was indebted to the seller in the amount sued for was misleading,

since the evidence as to the breach of warranty could have justified a finding for a less amount. *Delta Motors, Inc. v. Childs*, 233 Miss. 125, 101 So. 2d 527 (1958).

An instruction authorizing the recovery of both attorney's fees and damages for lost time and inconvenience if the plaintiff was entitled to possession of the tractor, regardless of whether there was any fraud, malice, oppression or wilful wrong, was clearly erroneous in a replevin action. *Ainsworth v. Blakeney*, 232 Miss. 297, 98 So. 2d 880 (1957).

In an action by an administratrix to recover for the wrongful death of her eight-year-old decedent, who was killed when struck by a truck, the trial court's instruction that if the jury should find for the plaintiff, they might consider as a proper element of damages the present net cash value of the life of deceased, if any, at the time of her death, was approved. *Reed v. Eubanks*, 232 Miss. 27, 98 So. 2d 132 (1957).

An instruction for plaintiff in an action for damages for property and personal injuries sustained in a motor vehicle accident, detailing the elements of damages the jury might consider if it found for plaintiff and which then recited "but not to exceed the amount sued for by plaintiff," was not erroneous where no question was raised as to the amount of the verdict. *Commercial Credit Corp. v. Smith*, 231 Miss. 574, 96 So. 2d 911 (1957).

In an appeal from the award of damages by a special court of eminent domain for the taking of a public highway right of way through landowner's land, trial court correctly instructed for the county that the jury in arriving at its verdict should not consider any elements of inconvenience or other elements which were speculative and remote. *Rasberry v. Calhoun County*, 230 Miss. 858, 94 So. 2d 612 (1957).

In a stockowner's replevin action wherein defendant counterclaimed for damages caused by trespassing, an instruction which might have misled the jury to believe that they were authorized to assess the plaintiff with the value of his own cattle in addition to, and as a part of, the allowance to defendant of damages,

was error. *Galloway v. Brown*, 230 Miss. 471, 93 So. 2d 459 (1957).

In a stockowner's replevin action wherein the landowner cross-claimed for damages caused by trespassing, court's instruction that the jury might find for the defendants and award them actual damages for injuries to crops, fences and lands, and if it believed that former trespasses, known to the plaintiff, had occurred, the amount of actual damages awarded should be double, was error where plaintiff's 23 head of cattle had entered and grazed upon a portion of an oat field which was planted for and used only as a pasture for cattle belonging to defendant and others, since, under the circumstances, double damages was not allowable under Code 1942, § 4871. *Galloway v. Brown*, 230 Miss. 471, 93 So. 2d 459 (1957).

In an action brought under Code 1942, § 6336-20, on behalf of 15-year-old school girl passenger injured in a collision between two school buses, owned and operated by the defendant, the trial court did not err in instructing that the jury might consider as an element of damage the disfigurement of the plaintiff, if any, caused by her injuries. *Rankin County v. Wallace*, 230 Miss. 413, 92 So. 2d 661 (1957).

In an action of bastardy, the court's instruction that the jury's verdict might read "We, the jury, find for the plaintiff and assess her damages at \$_____ for the support and maintenance of the child to this date, and the additional amount of \$_____ per _____ (month, quarter or annum) from this date until said child shall reach the age of 18 years," was not erroneous as to form. *Thomas v. Cook*, 229 Miss. 458, 91 So. 2d 275 (1956), motion overruled, 236 Miss. 365, 109 So. 2d 861 (1959).

Although every factor affecting a depreciated market value may be put in evidence, they should not be made subject of special comment in instructions because this results in a duplication of damages. *Wheeler v. State Hwy. Comm'n*, 212 Miss. 606, 55 So. 2d 225 (1951).

Instruction in employee's suit for injuries, indicating form of verdict and leaving

amount blank for jury to fill in was not reversible error where amount awarded was less than that sued for. *Johns-Manville Prods. Corp. v. McClure*, 46 So. 2d 539 (Miss. 1950).

Instructions in employee's suit to recover damages for injuries to the effect that jury can assess damages in such amount as jury may believe from preponderance of evidence plaintiff may have sustained including pain and suffering, loss of earning power, and injury to his body, was proper. *Johns-Manville Prods. Corp. v. McClure*, 46 So. 2d 539 (Miss. 1950).

In death action instruction authorizing jury to consider on question of damages the value of services of deceased to her husband, and the value of her association, society, and companionship to her husband and children, was proper. *Gulf Trans. Co. v. Allen*, 209 Miss. 206, 46 So. 2d 436 (1950).

In action for damages for injuries sustained in automobile collision, refusal of instruction limiting recovery for medical bills to \$205.00, amount expended by plaintiff up to time of trial, is correct because instruction would have prohibited jury from taking into consideration any medical expenses which plaintiff might reasonably be expected to have to pay in future. *Kouvarakis v. Hawver*, 208 Miss. 697, 45 So. 2d 278 (1950).

In instructions on amount of damages recoverable, the use of expression authorizing recovery not to exceed stated amount sued for endangers verdict and may result in its reversal. *St. Louis-San Francisco Ry. v. Dyson*, 207 Miss. 639, 43 So. 2d 95 (1949).

In action brought under Federal Employers' Liability Act, instruction for plaintiff employee authorizing recovery of damages not to exceed stated amount sued for does not require reversal when damages awarded are not excessive, in view of fact that Supreme Court of United States has refused to condemn similar instructions in federal courts. *St. Louis-San Francisco Ry. v. Dyson*, 207 Miss. 639, 43 So. 2d 95 (1949).

Instruction to jury to bring in verdict, once liability is found, "not in excess of Fifteen Thousand Dollars, as alleged in

the declaration," should not be given in action for damages for battery in which conflict in testimony is sharp and there is no sufficient basis for so substantial an award for personal injury. *Hawkins v. Stringer*, 205 Miss. 121, 38 So. 2d 454 (1949).

In action for damages for battery, it is error to refuse instruction for defendant which denies to plaintiff any right to recover for permanent injuries and impaired eyesight when there is no substantial evidence of such injuries. *Hawkins v. Stringer*, 205 Miss. 121, 38 So. 2d 454 (1949).

Plaintiff could not complain of instruction limiting amount of recovery on loss of automobile to price fixed by the Office of Price Administration, where he asked for and obtained such instruction rather than one authorizing a verdict for the actual or replacement value of the automobile under all the evidence. *St. Paul Fire & Marine Ins. Co. v. Staten*, 200 Miss. 197, 26 So. 2d 538 (1946).

In depositor's action against bank for damage to credit and reputation resulting from improper dishonoring of checks, where jury first returned verdict for plaintiff but assessed his damages at "nothing," court's oral statement to jury to "return to your room and find a verdict for something," held reversible error. *Weaver v. Grenada Bank*, 180 Miss. 876, 179 So. 564 (1938).

In action for death of school bus passenger in crossing collision, where jury returned two separate verdicts, one against railroad for \$8,500 and other against bus driver for \$1,000, returning verdicts to jury for further consideration, with directions that one verdict for entire sum be rendered, held proper. *Mississippi Cent. R.R. v. Roberts*, 173 Miss. 487, 160 So. 604 (1935), appeal dismissed, 296 U.S. 536, 56 S. Ct. 107, 80 L. Ed. 381 (1935).

It is erroneous to instruct the jury that it may find in any amount not exceeding the amount sued for, where the amount sued for is excessive damages. *Gulfport & Miss. Coast Traction Co. v. Keebler*, 130 Miss. 631, 94 So. 795 (1922).

28. —Punitive damages.

While punitive damages are not always appropriate whenever an insurance policy

contains a provision that is invalid under state law, an insurer is not entitled to a peremptory instruction on liability to the effect that the insurer can never be liable when it acts in accordance with the provisions of its policy, regardless of their invalidity. *Independent Life & Accident Ins. Co. v. Peavy*, 528 So. 2d 1112 (Miss. 1988).

In an action for false arrest and malicious prosecution, an instruction that the jury might determine malice from a preponderance of the evidence, from the defendant's conduct and declaration, and from the zeal and activity of the defendant in pushing the prosecution against the plaintiff, was a comment on the testimony and so confusing that the jury might easily reach the conclusion that it was a peremptory instruction to find punitive damages. *Allen v. Ritter*, 235 So. 2d 253 (Miss. 1970).

In a suit for damages arising out of the sale of an automobile, instructions requested by the plaintiff relating to punitive or exemplary damages were properly refused by the trial judge where the instructions required that the plaintiff prove only by a preponderance of the evidence that fraud was perpetrated upon her, since where fraud is charged it must be shown by evidence which is clear and more convincing than a mere preponderance. *Brewster v. Bubba Oustalet, Inc.*, 231 So. 2d 189 (Miss. 1970).

Punitive damages are ordinarily recoverable only in cases where the negligence is so gross as to indicate reckless or wanton disregard of the safety of others, and where the evidence does not disclose such a degree of negligence on the part of the defendant the trial court should instruct the jury that no punitive damages could be awarded. *Ulmer v. Bunner*, 190 So. 2d 448 (Miss. 1966).

In a personal injury damage suit growing out of an accident caused by the backing of a truck over the body of a 33-month-old girl, since the negligence on the part of the defendant driver was not so reckless as to evince disregard for the rights of others or so gross as to be equivalent to a wilful wrong, defendants were entitled to an instruction that they were not liable for punitive damages, even though the plaintiffs sought no instructions for punitive

damages, the declaration having submitted to the jury the plaintiffs' demand for punitive damages. *Fowler Butane Gas Co. v. Varner*, 244 Miss. 130, 141 So. 2d 226 (1962).

In an action against a municipal policeman and the surety upon his official bond for wrongful assault upon the plaintiff by the policeman, an instruction that if the jury believed that the policeman acted wilfully in striking plaintiff it could assess punitive damages by way of punishment to the defendants was error as to the surety company, since in absence of a statute sureties on official bonds are not liable for punitive or exemplary damages. *Vanderslice v. Shoemaker ex rel. Dabbs*, 233 Miss. 523, 102 So. 2d 804 (1958).

Where it appeared that the defendant, while driving at a speed in excess of the city speed limit, either ignored or failed to see a stop sign, and without any effort to stop or check her speed ran into the intersection, striking plaintiff's pickup truck broadside, which defendant failed to see although it was daylight and there was nothing to obscure her vision, plaintiff was entitled to an instruction on punitive damages. *Dame v. Estes*, 233 Miss. 315, 101 So. 2d 644 (1958).

In an action for damages for an alleged wrongful trespass committed by defendant in repossessing an automobile, where there was no substantial evidence to show that the defendant's agent used trickery or chicanery, or made false representations to obtain possession of the automobile, the trial court did not err in refusing to submit to the jury the question of punitive damages. *Bradley v. Associates Dist. Corp.*, 230 Miss. 131, 92 So. 2d 468 (1957).

A court should not instruct a jury that it is its duty to assess punitive damages. *Southeastern Express Co. v. Thompson*, 139 Miss. 344, 104 So. 80 (1925).

Nor can a court compel the assessment of punitive damages. *Austin Mach. Corp. v. Clark-Hunt Contracting Co.*, 140 Miss. 78, 103 So. 1 (1925).

29. —Instructions on statute.

A plaintiff motorist was entitled to an instruction that a preceding motorist was negligent as a matter of law under § 63-3-707, which provides that a driver should

not turn a vehicle from a highway unless the turn can be made with reasonable safety, where the preceding driver admitted that he turned his vehicle to the left out of his lane of traffic without first looking to see whether the plaintiff was following him, and the court's refusal to give this requested instruction was reversible error. *Conner v. Harris*, 624 So. 2d 482 (Miss. 1993).

A party is not entitled to an instruction that one should yield to the car first entering an intersection where the statute requires stopping before entering the intersection in response to a red signal light, and Code 1942, § 8195 merely prescribes the general rule as to an ordinary intersection and is inapplicable to one with traffic lights and signals. *Gates v. Green*, 214 So. 2d 828 (Miss. 1968).

In an action brought by a house mover against an electric company for injuries he received from coming into contact with a live power line, an instruction for defendant that if jury believed the power line in question had been erected and maintained in conformity with Code 1942, § 2778 and National Electric Safety Code there would be no liability on defendant, was erroneous and misleading for the moving of a house along a highway is not "common use of the highway," and instruction was also contrary to rule that whether utility is negligent despite compliance with National Electric Safety Code was a question for jury. *Crouch v. Mississippi Power & Light Co.*, 193 So. 2d 144 (Miss. 1966).

To instruct the jury for the plaintiff in an automobile collision action that jury could not find him guilty of contributory negligence because of the comparative negligence statute was error. *Whitten v. Land*, 188 So. 2d 246 (Miss. 1966).

In an action by a railroad company for damages caused to its train when it was struck by a truck at a rural crossing for which there was no legally imposed speed limit, it was error to grant an instruction for the defendant that if the jury believed from the evidence that at the time and place in question the train was being run at an unlawful rate of speed under the conditions then prevailing, the railroad was guilty of negligence. *Illinois Cent. R.R. v. Aldy*, 185 So. 2d 680 (Miss. 1966).

An instruction based on the failure-to-stop-at-an-intersection -statute (Code 1942, § 8197) was properly refused when it was not worded in accordance with the requirements of the statute. *Bush Constr. Co. v. Walters*, 254 Miss. 266, 179 So. 2d 188 (1965).

In action involving motor vehicle collision, instructions that if the demands of the parties were valid and equal, the verdict should be for defendant, that if plaintiff did not have a valid claim against a counter-claimant, and if the counter-claimant had a valid claim against plaintiff, then the verdict should be for the counter-claimant for his compensatory damages, and that if both parties had valid claims, but the claim of the counter-claimant exceeded that of the plaintiff, then the verdict should be for the counter-claimant for the excess over the plaintiff's claim, constituted substantial compliance with Code 1942, § 1483.5. *Johnson v. Richardson*, 234 Miss. 849, 108 So. 2d 194 (1959).

In an action for personal injuries and property damages resulting when plaintiff's automobile ran into defendant's truck which was going in the same direction on a U. S. highway, where it appeared that the speed of defendant's truck at the time of the accident was from 10 to 20 miles per hour, the trial court committed reversible error in failing to charge that if the defendant was driving his vehicle on a federal designated highway at the time and place of the accident at a speed of less than 30 miles per hour where no fact existed justifying such slow speed under Code 1942, § 8178, and the reduced speed was the proximate, or a contributory cause of the accident, the jury should find for the plaintiff. *Netterville v. Crawford*, 233 Miss. 562, 103 So. 2d 1 (1958).

In an action for injuries sustained by a 16-year-old motorcyclist in an intersectional collision with a truck, the driver of which had, contrary to Code 1942, § 8189(a), and a city ordinance, "cut the corner" in making a left turn, court properly instructed that the truck driver was guilty of negligence, and that plaintiff could recover on account thereof, if such negligence was a proximate, contributing cause of the collision. *City of Jackson v.*

Reed, 233 Miss. 304, 103 So. 2d 6 (1958), overruled on other grounds, *City of Jackson v. Williamson*, 1999 Miss. Lexis 89 (Miss. Feb. 25, 1999).

In an action for injuries sustained by a 16-year-old motorcyclist in an intersectional collision with a truck, the driver of which had, contrary to Code 1942, § 8189(a), and a city ordinance, "cut the corner" in making a left turn, the court properly instructed that the truck driver was guilty of negligence, and plaintiff could recover on account thereof, if the negligence was a proximate, contributing cause of the collision. *City of Jackson v. Reed*, 233 Miss. 304, 103 So. 2d 6 (1958), overruled on other grounds, *City of Jackson v. Williamson*, 1999 Miss. Lexis 89 (Miss. Feb. 25, 1999).

Where a motorist had approached an intersection with the signal light flashing red in her direction, and failed to stop before entering therein, she was not entitled to an instruction under Code 1942, § 8195, providing that the driver of a vehicle approaching an intersection shall yield the right of way to vehicle which has entered the intersection from a different highway. *Bates v. Walker*, 232 Miss. 804, 100 So. 2d 611 (1958).

There being no statute imposing a duty upon the driver of an overtaking vehicle the absolute duty of sounding an audible signal before passing without regard to whether the sounding of the signal is reasonably necessary to insure safe operation, an instruction that such was the law constituted reversible error where the proof was uncontradicted that the driver of the overtaking vehicle in which plaintiff was riding, did not sound his horn before attempting to pass defendant's vehicle, since it in effect peremptorily instructed the jury that the driver of the overtaking vehicle was guilty of negligence. *Clark v. Mask*, 232 Miss. 65, 98 So. 2d 467 (1957).

An instruction that if the driver of the car in which plaintiff was riding negligently attempted to pass defendant's vehicle within 100 feet of an intersection, and such negligence was the sole proximate cause of the accident, the jury could find for the defendant, was correct, where the defendant showed that the attempt to pass was made within 50 or 60 feet of an

intersection, which was one coming within the contemplation of the statute. *Clark v. Mask*, 232 Miss. 65, 98 So. 2d 467 (1957).

Since no question of negligence is involved in the failure to comply with Code 1942, § 8163, the trial court properly refused to instruct that the fact that the defendant left the scene of a motor vehicle accident was a strong presumption that he was guilty of negligence by failing to stay at the scene of the accident and rendering first aid to the injured plaintiff and assisting in calling an ambulance and discharging other duties owed to the plaintiff. *Clark v. Mask*, 232 Miss. 65, 98 So. 2d 467 (1957).

In an action arising out of intersection motor vehicle collision, the court's instruction that if the driver of a truck, which was not a "pick-up" truck, was violating the law in driving the truck at a speed of more than 45 miles per hour, such fact did not raise any presumptions of negligence on the part of the driver, was error in view of Code 1942, § 8176. *Hill v. Columbus Ice Cream & Creamery Co.*, 230 Miss. 634, 93 So. 2d 634 (1957).

In cross actions for damages and personal injuries arising out of a motor vehicle intersection collision, the trial court's instruction that defendant, who had been traveling along a road upon which a stop sign was located, not only had the duty to stop his automobile at the intersection but "to wait until he could safely proceed," was error, since that duty was not required by Code 1942, § 8197. *Hill v. Columbus Ice Cream & Creamery Co.*, 230 Miss. 634, 93 So. 2d 634 (1957).

In a wrongful death action arising out of defendant's automobile colliding with a bicycle ridden by a nine-year-old child upon a highway, the trial court did not err in instructing that the rider of a bicycle or other vehicle along a public highway should not turn from a direct course upon the highway unless and until such movement could be made with reasonable safety and then only after giving an appropriate signal, and the signal for a left turn should be given by extending the hand and arm horizontally. *Moak v. Black*, 230 Miss. 337, 92 So. 2d 845 (1957).

In a wrongful death action arising out of a defendant's automobile colliding with a

bicycle ridden by a nine-year-old child upon the highway, the court erred in instructing that if the boy's failure to observe the requirements of the statute was the sole proximate cause of the accident, the jury could return a verdict for the defendant, since the jury might have been misled to conclude that, even though the defendant had seen the boy on the bicycle when he was several hundred feet in front of him, and failed to sound his horn, or apply his brakes until it was too late to avoid hitting the boy whose back was turned to the approaching automobile, they might disregard these facts and treat the unexpected and sudden action of the child in making a left turn on a bicycle as the sole proximate cause of the accident. *Moak v. Black*, 230 Miss. 337, 92 So. 2d 845 (1957).

In action to recover damages for fire loss caused by defendant's train blocking street in municipality so as to prevent fire department from putting out fire, instructions to plaintiff that law prohibits railroad company from stopping train at places where it crosses street within the city limits for more than five minutes did not mislead jury, although such instruction left uncertain whether it based liability entirely on the state statute which has been held inapplicable to streets in municipalities, or on a combination of the statute and the city ordinances, since the case was tried on the theory of the negligence of defendant in violating the municipal ordinances. *New Orleans & Northeastern R. Co. v. Bryant*, 209 Miss. 193, 46 So. 2d 433 (1950).

An erroneous instruction on the prima facie statute as to running of a train. *Yazoo & Miss. V.R.R. v. Messina*, 109 Miss. 143, 67 So. 963 (1915), rev'd, 240 U.S. 395, 36 S. Ct. 368, 60 L. Ed. 709 (1916).

30. —Miscellaneous.

An instruction using the phrase "a competent physician is not liable per se for a mere error of judgment" or "good faith error in judgment or honest error in judgment" should not be given in medical negligence cases because of their potential for confusing the jury; negligence that results in injury should support a finding of liability by a jury in a medical negligence case regardless of whether the act

or omission giving rise to the injury was caused by an "honest error in judgment." *Day v. Morrison*, 657 So. 2d 808 (Miss. 1995).

An instruction to the jury regarding the standard of care required of a physician should refer to "that degree of care, skill, and diligence which would have been provided by a reasonably prudent, minimally competent physician" under similar circumstances; the term "reasonably prudent" speaks to the care and diligence that a professional must bring to a task, and the term "minimally competent" describes the degree of skill and knowledge a professional must bring to a task. *McCarty v. Mladineo*, 636 So. 2d 377 (Miss. 1994), reh'g denied (Miss. June 2, 1994).

In a proceeding to establish the paternity of an infant, an instruction to the jury regarding blood tests submitted into evidence constituted reversible error where the blood tests established a 99.99 percent probability that the defendant was the father, and the instruction stated that the blood tests were "not conclusive of the issue of paternity and merely establish that out of the black male population it is biologically possible for the defendant to be the father"; although the test results did not constitute conclusive evidence of paternity, it was error to instruct the jury that the tests meant that paternity was a biological "possibility" since this language tended to discredit the evidence in that it reduced the 99.99 percent probability to a mere possibility. *Department of Human Servs. v. Moore*, 632 So. 2d 929 (Miss. 1994).

In a proceeding to establish the paternity of an infant, an instruction to the jury regarding the issue of whether the mother and the defendant had sexual intercourse during the period of probable conception constituted reversible error where the instruction stated that the jury would have to find that the couple had sexual intercourse without regard to the blood test results, which established a 99.99 percent probability that the defendant was the infant's father, or that the tests could not be a factor in the jury's conclusion on this question of fact; although such test results, standing alone, are insufficient to prove this element of a paternity claim,

test results of this nature are relevant to whether sexual intercourse took place during the period of possible conception since they tend to make the existence of the fact that sexual intercourse took place during that time period more probable. *Department of Human Servs. v. Moore*, 632 So. 2d 929 (Miss. 1994).

The granting of an instruction in a will contest which advised the jury that it could not return a verdict for the proponent if it found that the testatrix was in any way influenced or guided or directed about or in or concerning the signing, publication, or the securing of attestation of the will by any person whomsoever, was reversible error, since it is undue influence that vitiates a will; a testator has the right to be directed and assisted in the preparation of his will and may have any aid or direction which he desires. *Briscoe v. Briscoe*, 255 So. 2d 313 (Miss. 1971).

In a personal injury action, the court properly refused the defendant's requested instruction that if a certain physician actually saw, examined and treated the plaintiff during the period of his alleged injuries, then the plaintiff could have used the physician as a witness and therefore the jury would be justified in inferring that the physician's testimony would have been unfavorable to the plaintiff, where the physician was a resident of another state and the record was silent as to whether he was available for testimony. *Great Atl. & Pac. Tea Co. v. Scallon*, 233 So. 2d 758 (Miss. 1970).

In a personal injury suit against a city, where the plaintiff had waived the privilege of questioning an out-of-state doctor who had examined the plaintiff, and the city did not thereafter move for continuance or file interrogatories, the city's request for an instruction permitting the jury to draw unfavorable inferences from the plaintiff's failure to present the out-of-state doctor as a witness, was properly refused. *City of Bay St. Louis v. Johnston*, 222 So. 2d 841 (Miss. 1969).

In an action brought by a shopper who alleged that the manager of a store had unlawfully stopped her and searched her purse without cause, an instruction in which mere suspicion was made the basis of probable cause to believe that the plain-

tiff was attempting to commit the act of shoplifting, was in error. *Butler v. W.E. Walker Stores, Inc.*, 222 So. 2d 128 (Miss. 1969).

An instruction which tells the jury that the defendant must not only drive his automobile so as to be able to stop within the range of his vision, but that he must so drive his automobile that he can actually discover an object, perform manual acts necessary to stop, and bring his vehicle to a complete stop, if necessary to avoid collision with others on or near the highway, is such an instruction that would make the defendant the absolute insurer of the safety of the plaintiff, and consequently should not be granted. *Mills v. Balias*, 254 Miss. 353, 180 So. 2d 914 (1965).

Instruction that it is a settled rule of law that insurance policies are always construed more strongly against the insurance company and more favorably for the insured should not have been given because it is not the function of the jury to construe the insurance contract. *Canal Ins. Co. v. Howell*, 253 Miss. 225, 175 So. 2d 517 (1965).

Under a policy requiring that the insurance company be given due notice if the insured gin was not to operate during the regular season, the question as to what constituted due notice and whether it was given was for jury, and an instruction that notice to an insurance agency was notice to the insurance company, was too broad. *Liverpool & London & Globe Ins. Co. v. Eagle Cotton Oil Co.*, 244 Miss. 110, 140 So. 2d 562 (1962).

An instruction as to the form of the verdict to be rendered should the jury find for the plaintiff, and instructing them to write it on a separate piece of paper, was not erroneous in a malpractice action. *Copeland v. Robertson*, 236 Miss. 95, 108 So. 2d 419 (1959), overruled on other grounds, *Hall v. Hilbun*, 466 So. 2d 856 (Miss. 1985).

In an action for rent due on truck and trailer equipment pursuant to a rent contract between parties, instructions which referred to the contract as being exhibit A to the plaintiff's declaration, which was but a short and simple method of bringing to the jury's consideration the three page

contract which was filed as an exhibition, was not erroneous. *Smith v. Thompson*, 233 Miss. 200, 101 So. 2d 530 (1958).

An instruction properly submitted to the jury the question of whether a new agreement embodied in a formal contract, at defendants' request, which the plaintiff signed and mailed to the defendants for execution by them, and the defendants' actions after receipt of the signed copies of the new agreement, extinguished the earlier permission authorizing defendants to take possession of the property on a month to month basis, subject to termination at plaintiff's will. *Spann v. Gulley*, 233 Miss. 62, 101 So. 2d 337 (1958).

In an appeal from an award of damages by special court of eminent domain for the taking of a public highway right of way through landowner's land, trial court's instruction advising the jury that the purpose of the view was to enable it to have a more intelligent understanding of the land and the location of the proposed road was proper, where the jury was further advised to consider all the other evidence along with its observations. *Raspberry v. Calhoun County*, 230 Miss. 858, 94 So. 2d 612 (1957).

Instructions to jury in civil case which refer jury to declaration are erroneous for reason that frequently declaration is couched in technical and complicated language and jury should not be required to go to declaration in order to decipher facts from it. *Jessup v. Reynolds*, 208 Miss. 50, 43 So. 2d 753 (1949).

Instruction in civil case which gives correct statement of necessary facts which jury must believe before awarding plaintiff verdict and which do not make it necessary for jury to sift declaration and carve out of it such facts as are essential to recovery is not erroneous on ground that it contains phrase, "as charged in the declaration." *Jessup v. Reynolds*, 208 Miss. 50, 43 So. 2d 753 (1949).

Instruction which announces correct principles of law is not ground for reversal merely because it is too long when jury is not misled or confused by it. *Y.D. Lumber Co. v. Aycock*, 41 So. 2d 35 (Miss. 1949).

In cases where a too close issue of fact is involved, instructions on burden of proof should go no further than to advise jury

that proponent of will or plaintiff in other civil cases is required to establish issue by preponderance of evidence. *Blalock v. Magee*, 205 Miss. 209, 38 So. 2d 708 (1949).

Substantial accuracy is all that is required in an instruction. *Neely v. City of Charleston*, 204 Miss. 360, 37 So. 2d 495 (1948).

Instruction that if certain physician treated plaintiff in action for personal injury, and that such physician was available as a witness in her behalf, presumption would arise that his testimony would be adverse to plaintiff if she failed to call him as a witness, was erroneous where plaintiff on examination waived her privilege at a time when the taking of testimony in the case had not reached the half-way mark and there was no showing that the doctor in question was not reasonably available and that his attendance could not have been procured without unreasonable delay or discomfiture to the court. *Clary v. Breyer*, 194 Miss. 612, 13 So. 2d 633 (1943).

31. Objections and exceptions.

A claim of error in the refusal of proffered instructions is procedurally preserved by the mere tendering of the instructions, suggesting that they are correct, and asking the court to submit them to the jury. This in and of itself affords opposing counsel fair notice of the party's position and the courts an opportunity to pass upon the matter. When instructions are refused, there is no reason to require an objection to the refusal, unless a value is to be placed upon "redundancy and nonsense." *Carmichael v. Agur Realty Co.*, 574 So. 2d 603 (Miss. 1990).

A defendant's objection to a general negligence instruction after judgment in a motion for judgment notwithstanding the verdict was barred where the defendant failed to object to the instruction before the case went to the jury. *Mills v. Barnhill*, 546 So. 2d 664 (Miss. 1989).

In action against town for damages to land caused by defective sewage tank, landowners held not precluded from challenging propriety of directed verdict for defendant, although instruction was not excepted to and no motion for new trial was made assigning as ground the giving

of such instruction, in view of statute and court rule making such action unnecessary. *Hodges v. Town of Drew*, 172 Miss. 668, 159 So. 298 (1935).

An instruction marked "given" or "refused" by the court and filed by the clerk is a part of the record and does not need to be excepted to. *Cox v. State*, 141 Miss. 607, 107 So. 7 (1926).

In a conflict between the parties in the Supreme Court as to correctness of a bill of exceptions, the court will view the instructions and other proof in determining its correctness. *Sovereign Camp, Woodmen of the World v. Sloan*, 136 Miss. 549, 101 So. 195 (1924).

An instance of a hypercritical objection to instruction. *Southern Ry. v. Floyd*, 99 Miss. 519, 55 So. 287 (1911).

The Supreme Court will take no notice of requests for instructions unless exceptions have been duly taken to the action of the court below with respect to them. *Barney v. Scherling*, 40 Miss. 320 (1866).

32. Review.

Supreme Court will reverse judgment on appeal because of errors of court below in erroneously granting some, and refusing other, instructions, which results in denial of fair trial to appellant because jury is not properly instructed on law of case. *Wilburn v. Gordon*, 209 Miss. 27, 45 So. 2d 844 (1950).

Fact that instruction is technically inaccurate will not alone cause a reversal of judgment; but when case on appeal is examined as a completed trial, and substantial error has not been committed and a fair and just result has been reached, judgment will be affirmed, notwithstanding error in instruction. *Neely v. City of Charleston*, 204 Miss. 360, 37 So. 2d 495 (1948).

An instruction marked "given" or "refused" by the court and filed by the clerk is a part of the record and does not need to be excepted to. *Cox v. State*, 141 Miss. 607, 107 So. 7 (1926).

An erroneous direction of verdict in favor of one defendant in an action for death held to be cause for reversal as to co-defendant as being equivalent to directed verdict against it. *Gulf & S.I.R.R. v. Carlson*, 137 Miss. 613, 102 So. 168 (1924).

Error in directing a verdict is reviewable on appeal though not assigned as a ground in motion for new trial. *Hayes v. Slidell Liquor Co.*, 99 Miss. 583, 55 So. 356 (1911).

An instruction correct as requested may be assigned as error on appeal because of erroneous modification thereof. *Mississippi Cent. R.R. v. Hardy*, 88 Miss. 732, 41 So. 505 (1906); *Coleman v. Yazoo & Miss. V. Ry. Co.*, 90 Miss. 629, 43 So. 473 (1907).

Instructions merely marked "given" or "refused" are not a part of the record unless indorsed by the clerk or indorsed in a bill of exceptions. *McBride v. Adams*, 70 Miss. 716, 12 So. 699 (1893).

Instructions marked "given" by the

clerk but not signed by the clerk will not be considered on appeal in the absence of the instructions being made a part of the record by bill of exceptions. *Hansford v. State*, 11 So. 106 (Miss. 1891).

The Supreme Court will not notice requests for instructions unless exceptions be duly taken to the action of the court below on them. *Barney v. Scherling*, 40 Miss. 320 (1866).

Instructions when marked "given" or "refused" by the clerk constitute a part of the record. *Swann v. West*, 41 Miss. 104 (1866); *Gulf Coast Stevedoring Co. v. Gibbs*, 124 Miss. 188, 86 So. 582 (1921), motion overruled, 124 Miss. 192, 86 So. 763 (1921).

RESEARCH REFERENCES

ALR. Instruction mentioning or suggesting specific sum as damages in action for personal injury or death. 2 A.L.R.2d 454.

Modern view as to propriety and correctness of instructions referable to maxim "falsus in uno, falsus in omnibus." 4 A.L.R.2d 1077.

Instructions, in will contest, defining natural objects of testator's bounty. 11 A.L.R.2d 731.

Indoctrination by court of persons summoned for jury service. 89 A.L.R.2d 197.

Verdict-urging instructions in civil case stressing desirability and importance of agreement. 38 A.L.R.3d 1281.

Verdict-urging instructions in civil case commenting on weight of majority view or authorizing compromise. 41 A.L.R.3d 845.

Verdict-urging instructions in civil case admonishing jurors to refrain from intransigence, or reflecting on integrity or intelligence of jurors. 41 A.L.R.3d 1154.

Propriety and prejudicial effect of sending written instructions with retiring jury in civil case. 91 A.L.R.3d 336.

Propriety and prejudicial effect of sending written instructions with retiring jury in criminal case. 91 A.L.R.3d 382.

Necessity of, and prejudicial effect of omitting, cautionary instruction to jury as to reliability of, or factors to be considered in evaluating, eyewitness identification testimony-state cases. 23 A.L.R.4th 1089.

Construction and application of provision of Rule 51 of Federal Rules of Civil Procedure requiring party objecting to instructions or failure to give instruction to jury, to state "distinctly the matter to which he objects and the grounds for objections." 35 A.L.R. Fed. 727.

Am Jur. 75A Am. Jur. 2d, Trial §§ 1077 et seq.

9A Am. Jur. Pl & Pr Forms (Rev), Evidence, Form 24 (instructions to jury-acceptance of stipulated fact as true); Form 72.1 (definitions); Form 125.1 (effect of number of witnesses on weight of evidence).

23 Am. Jur. Pl & Pr Forms (Rev), Trial, Forms 101-269 (Instructions and admonitions to jury).

CJS. 88A and 88B C.J.S., Trial §§ 444-761.

Practice References. Young, Trial Handbook for Mississippi Lawyers §§ 2:7, 34:2, 34:4, 34:8, 35:6.

§ 11-7-157. No special form of verdict required.

No special form of verdict is required, and where there has been a substantial compliance with the requirements of the law in rendering a

verdict, a judgment shall not be arrested or reversed for mere want of form therein.

SOURCES: Codes, 1906, § 762; Hemingway's 1917, § 565; Laws, 1930, § 574; Laws, 1942, § 1518.

Cross References — Members of jurors to agree on verdict in civil case, see § 13-5-93.

Verdict on trial of two or more defendants in criminal case, see § 99-19-7.

Another section derived from same 1942 code section, see § 99-19-9.

Special verdicts and general verdicts, see Miss. R. Civ. P. 49.

JUDICIAL DECISIONS

1. In general.
2. Damages.
3. Surplusage.
4. Comparative negligence.

1. In general.

The trial court did not err in allowing the interrogatory form of the verdict where the verdict form accurately set out the elements of the action. *Pickering v. Industria Masina I Traktora*, 740 So. 2d 836 (Miss. 1999).

Verdicts of guilty on three counts of aggravated assault were not rendered invalid by the use of "Agg Assault" and "Avt Assault" on the verdict forms, especially as the jury was polled and all jurors were unanimous in their verdicts of guilty. *Coles v. State*, 756 So. 2d 12 (Miss. Ct. App. 1999).

The court did not err by refusing to clarify the form of the verdict where the jury verdict awarded a lump sum of damages to each individual plaintiff, with the exception of a couple of joint awards, but did not apportion out the amount applicable to each type of damage awarded. *Mississippi Valley Gas Co. v. Estate of Walker*, 725 So. 2d 139 (Miss. 1998).

The basic test as to the sufficiency of a verdict as to form is whether or not it is an intelligent answer to the issues submitted and expressed so that the intent of the jury can be understood by the court. *Henson Ford, Inc. v. Crews*, 249 Miss. 45, 160 So. 2d 81 (1964); *Wilson v. State*, 197 Miss. 17, 19 So. 2d 475 (1944).

A verdict that "we the jury find the defendant not guilty," returned not in a criminal case but in a tort action, is not a ground for reversible error for, under this

section [Code 1942, § 1518], no special form of verdict is required. *Mizell v. Cauthen*, 251 Miss. 418, 169 So. 2d 814 (1964).

Only general verdicts are provided for in this state. *Flournoy v. Brown*, 200 Miss. 171, 26 So. 2d 351 (1946).

After verdict, a jury may be polled, but not interrogated otherwise. *Flournoy v. Brown*, 200 Miss. 171, 26 So. 2d 351 (1946).

2. Damages.

In an action to recover for personal injuries sustained in a motor vehicle collision, the trial court erred in finding from the verdict returned that the jury intended to find for defendants under the instructions it had received, where the jury had been instructed that if it found both parties negligent, it should reduce plaintiff's recovery in proportion to her negligence, and where the jury returned a verdict finding both parties negligent to a degree with no damages assessed; the trial court should have returned the jury to further deliberate on a proper verdict. *Harrison v. Smith*, 379 So. 2d 517 (Miss. 1980).

The fact that the jury in considering the contributory negligence of plaintiffs' decedent and the negligence of defendants in an action arising from an automobile collision and determining that the negligence of the parties was equal does not per se establish the fact that the jury did not follow the law in determining damages, and such fact did not constitute reversible error. *Necaise v. Blalock*, 210 So. 2d 637 (Miss. 1968).

Verdict that "We the jury find for the plaintiff, twelve men for the plaintiff,

eleven men recommend \$22,500," held sufficient in form. *Henson Ford, Inc. v. Crews*, 249 Miss. 45, 160 So. 2d 81 (1964).

In an action by plaintiff against defendant for damages to its trucks sustained in an intersectional motor vehicle collision wherein defendant counterclaimed for damages to his automobile and personal injuries, jury's verdict reciting, "we, the jury, find both the plaintiff and defendant counter-plaintiff at fault, and assess no damages to either side" was sufficiently clear for the lower court to enter judgment thereon. *Hill v. Columbus Ice Cream & Creamery Co.*, 230 Miss. 634, 93 So. 2d 634 (1957).

3. Surplusage.

In an action in which the only issue was damages, the parties having stipulated as to liability, the jury's initial verdict was sufficient and it was error for the trial court to return the jury for further deliberations where the initial verdict assessed damages at \$5,000, thus answering the only issue submitted, and, though the

assessment of the amount was followed by recommendations as to how to disperse the funds, such latter recommendations were only surplusage. *Powell v. Thigpen*, 336 So. 2d 719 (Miss. 1976).

The written statement of the jury on the verdict and on a separate piece of paper in an automobile collision death action that "we find the defendant 50 percent responsible for accident and death of Mrs. Lucille Bilbro, \$92,500" was surplusage and not a part of the verdict. *Necaise v. Blalock*, 210 So. 2d 637 (Miss. 1968).

Jury's attempt to apportion among joint tortfeasors amount of damages found by it may be disregarded as surplusage. *Meridian City Lines v. Baker*, 206 Miss. 58, 39 So. 2d 541, 8 A.L.R.2d 854 (1949).

4. Comparative negligence.

A court is not required to provide a jury with an instruction regarding the format for a comparative negligence verdict. *O'Neal v. Roche Biomedical Lab., Inc.*, 805 So. 2d 551 (Miss. Ct. App. 2000).

RESEARCH REFERENCES

Am Jur. 75B Am. Jur. 2d, Trial §§ 1778 et seq.

23 Am. Jur. Pl & Pr Forms (Rev), Trial, Forms 321-336 (general verdict).

23 Am. Jur. Pl & Pr Forms (Rev), Trial, Forms 341-451 (special issues, verdicts, and interrogatories).

CJS. 89 C.J.S., Trial §§ 817 et seq.

Law Reviews. Symposium on Mississippi Rules of Civil Procedure: Juries and Jury Verdicts — Rules 38, 48-51, and 59. 52 Miss. L. J. 163, March 1982.

Practice References. Young, Trial Handbook for Mississippi Lawyers §§ 36:1, 36:2.

§ 11-7-159. Verdict may be reformed at the bar if informal or defective.

If the verdict is informal or defective, the court may direct it to be reformed at the bar. Where there has been a manifest miscalculation of interest, the court may direct a computation thereof at the bar, and the verdict may, if the jury assent thereto, be reformed in accordance with such computation.

SOURCES: Codes, 1906, § 779; Hemingway's 1917, § 562; Laws, 1930, § 571; Laws, 1942, § 1515.

Cross References — Another section derived from same 1942 code section, see § 99-19-11.

JUDICIAL DECISIONS

1. In general.

Since § 11-7-159 does not require that a verdict be reformed at the bar, it is merely directory, and therefore, the trial court did not err in directing the jury to retire to the juryroom and reform its verdict. *Monroe County Elec. Power Ass'n v. Pace*, 461 So. 2d 739 (Miss. 1984).

Code 1942, § 1670 does not require at least three days notice of amendment before the amendment is actually made, and there was no error in the trial court correcting the verdict of the jury without the required notice, particularly in view of the fact that this section [Code 1942, § 1515] provides that if the verdict is informal or defective the court may direct it to be reformed at the bar. *Poynter v. Trotter*, 250 Miss. 812, 168 So. 2d 635 (1964).

Where a jury trying a defendant had announced in open court that it had arrived at a verdict, which was handed to the clerk and, as read, found the defendant guilty as charged, whereupon one of the jurors mistakenly advised the court

that the verdict was incorrect, and the word "not" was inserted in the verdict, but before the jury had adjourned, the court, being advised that amended verdict was wrong, ordered the jury back to the jury room for further deliberations and defendant was again found guilty, the court did not err in overruling defendant's motion for a new trial where it was shown that defendant's rights were not prejudiced by the occurrence. *Anderson v. State*, 231 Miss. 352, 95 So. 2d 465 (1957).

Action of circuit court in permitting jury to reassemble and put its verdict in proper form before they had left courtroom or sight and presence of court was proper under this section [Code 1942, § 1515], where verdict was first returned, "We, jury, find the defendant guilty-charge," and was corrected to read, "We, the jury, find the defendant guilty as charged," and was signed by each member of jury. *Serio v. City of Brookhaven*, 208 Miss. 620, 45 So. 2d 257 (1950).

RESEARCH REFERENCES

ALR. Amendment of record of judgment in state civil case to correct judicial errors and omissions. 50 A.L.R.5th 653.

Am Jur. 75B Am. Jur. 2d, Trial §§ 1886 et seq.

CJS. 89 C.J.S., Trial §§ 899-916.

§ 11-7-161. If verdict not responsive, jury to deliberate further.

If the verdict is not responsive to the issue submitted to the jury, the court shall call their attention thereto and send them back for further deliberation.

SOURCES: Codes, 1906, § 780; Hemingway's 1917, § 563; Laws, 1930, § 572; Laws, 1942, § 1516.

Cross References — Lack of agreement on verdict of two or more defendants in criminal case, see § 99-19-7.

JUDICIAL DECISIONS

1. In general.
2. Reversal of verdict.

1. In general.

When jury in negligence case involving 3 defendants returns verdict which finds for 2 of defendants but makes no mention

of third defendant, court may accept verdict as to defendants specifically mentioned but must return jury to jury room to reform verdict as to question of liability of third defendant; failure to do so will result in mistrial as to that defendant

despite plaintiff's failure to request instruction against that defendant, individually. *Adams v. Green*, 474 So. 2d 577 (Miss. 1985).

In an action in which the only issue was damages, the parties having stipulated as to liability, the jury's initial verdict was sufficient and it was error for the trial court to return the jury for further deliberations where the initial verdict assessed damages at \$5,000, thus answering the only issue submitted, and, though the assessment of the amount was followed by recommendations as to how to disperse the funds, such latter recommendations were only surplusage. *Powell v. Thigpen*, 336 So. 2d 719 (Miss. 1976).

2. Reversal of verdict.

The Court of Appeals erred when it reversed the verdict in a motor vehicle personal injury action on the ground that the jury had failed to follow its instruc-

tions and that the verdict was vague and incomplete as to which plaintiff had recovered since it was evident that the jury's verdict was a joint verdict in favor of both plaintiffs, even though the verdict stated that the jury assess the "Plaintiff's" damages. *Byars v. Moore Planting Co.*, 755 So. 2d 415 (Miss. 2000).

The plaintiffs in an automobile negligence action were entitled to reversal of the jury's verdict where (1) the plaintiffs sought damages both for injuries received in the accident by one plaintiff and for loss of consortium for the other plaintiff, (2) the court instructed the jury to either render separate verdicts for each plaintiff or for the defendant, (3) the jury rendered a single verdict for the plaintiffs, and (4) the trial judge failed to send the verdict back to the jury with instructions to follow his instructions. *Byars v. Moore Planting Co.*, — So. 2d —, 1999 Miss. App. LEXIS 54 (Miss. Ct. App. Feb. 23, 1999).

RESEARCH REFERENCES

ALR. Correction, by trial court, of verdict which finds for party on his cause of action or counterclaim for money judgment, but which does not state amount of recovery, or is indefinite in this regard, or which affirmatively states that he is enti-

tled to no amount. 49 A.L.R.2d 1328.

Am Jur. 75B Am. Jur. 2d, Trial §§ 1791 et seq.

CJS. 89 C.J.S., Trial §§ 864-867.

Practice References. Young, Trial Handbook for Mississippi Lawyers § 36:4.

§ 11-7-163. No error if verdict omits something.

If, on an issue concerning several things in one count, a verdict be found for only part of them, it shall not be error, but the plaintiff shall be barred of his title to the things omitted.

SOURCES: Codes, *Hutchinson's* 1848, ch. 59, art. 1 (91); 1857, ch. 61, art. 184; 1871, § 625; 1880, § 1584; 1892, § 721; Laws, 1906, § 781; *Hemingway's* 1917, § 564; Laws, 1930, § 573; Laws, 1942, § 1517.

RESEARCH REFERENCES

Practice References. Young, Trial Handbook for Mississippi Lawyers § 36:2.

§§ 11-7-165 and 11-7-167. Repealed.

Repealed by Laws, 1991, ch. 573, § 141, eff from and after July 1, 1991.

§ 11-7-165. [Codes, *Hutchinson's* 1848, ch. 59, art. 1 (91); 1857, ch. 61, art. 184; 1871, § 625; 1880, § 1584; 1892, § 720; 1906, § 778; *Hemingway's* 1917, § 561; 1930, § 570; 1942, § 1514]

§ 11-7-167. [Codes, 1857, ch. 61, art. 181; 1871, § 622; 1880, § 1727; 1892, § 746; 1906, § 808; Hemingway's 1917, § 596; 1930, § 600; 1942, § 1544]

Editor's Note — Former § 11-7-165 stated that if the verdict omitted a price or value, the court could at any time award a writ of inquiry to ascertain the same.

Former § 11-7-167 listed defects that would not stay or reverse a judgment after verdict.

§ 11-7-169. Judgment—remedial orders.

In all actions in which the right to real or personal estate is in controversy, the court or the judge thereof shall make an order for the protection of the property in controversy from waste or destruction, and to prevent the removal of personal property beyond the jurisdiction of the court, upon satisfactory proof being made of the necessity for such order, and may enforce such order by an attachment for contempt and other proper process; but in all such cases the court or judge may require a bond of the party applying for the order, in an adequate penalty, payable to the opposite party, with sufficient sureties, to be approved by the court or judge, conditioned to pay all such damages as may be suffered by reason of such order in case the principal obligor be cast in the suit.

SOURCES: Codes, 1857, ch. 61, art. 179; 1871, § 661; 1880, § 1729; 1892, § 748; Laws, 1906, § 810; Hemingway's 1917, § 598; Laws, 1930, § 602; Laws, 1942, § 1546.

Cross References — Power of all courts to punish contempt, see § 9-1-17.

Authority of all judges to grant remedial writs, see § 9-1-19.

Uniform enforcement of foreign judgments, see §§ 11-7-301 et seq.

Writ of sequestration, see §§ 11-29-1 et seq.

Attachments at law generally, see §§ 11-33-1 et seq.

Writ of garnishment*generally, see §§ 11-35-1 et seq.

Temporary protective orders in quo warranto proceeding, see § 11-39-15.

§ 11-7-171. Repealed.

Repealed by Laws, 1991, ch. 573, § 141, eff from and after July 1, 1991.

[Codes, 1857, ch. 61, art. 253; 1871, § 822; 1880, § 1730; 1892, § 749; 1906, § 811; Hemingway's 1917, § 599; 1930, § 603; 1942, § 1547; Laws, 1950, ch. 332]

Editor's Note — Former § 11-7-171 specified when a judgment was final.

§ 11-7-173. Judgment on bonds.

In an action brought upon a bond for the payment of money, wherein the plaintiff shall recover, judgment shall be entered for the penalty of the bond, to be discharged by the payment of the principal and interest due and costs of suit, and execution shall issue accordingly. However, if before judgment the defendant shall bring into court the principal and interest due upon the bond, he shall be discharged, and in that case judgment shall be entered for the costs alone.

SOURCES: Codes, 1857, ch. 61, art. 254; 1871, § 824; 1880, § 1731; 1892, § 750; Laws, 1906, § 812; Hemingway's 1917, § 600; Laws, 1930, § 604; Laws, 1942, § 1548.

Cross References — Release of excess in judgment on bond, see § 11-1-21.
Uniform enforcement of foreign judgments, see §§ 11-7-301 et seq.

RESEARCH REFERENCES

Am Jur. 12 Am. Jur. 2d, Bonds §§ 44-48. **CJS.** 11 C.J.S., Bonds §§ 130-133.

§ 11-7-175. Liability of ships and vessels for causing death or injury.

Whenever the death of a person shall be caused by the wrongful act, neglect, or default of any ship or vessel, and the act, neglect, or default is such as would (if death had not ensued) have entitled the party injured to maintain an action, or to proceed in rem against the said ship or vessel, or in personam against the owners thereof, or those having control of her, and to recover damages in respect thereof, then, in every such case the ship or vessel, which, had not death ensued, would have been liable to an action for damages, or to a libel in rem, and her owners, or those responsible for her acts or defaults or negligence to a libel in personam, shall be liable for all damages notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to a felony.

SOURCES: Codes, Hemingway's 1921 Supp, § 616a; Laws, 1930, § 621; Laws, 1942, § 1565; Laws, 1920, ch. 234.

Cross References — Actions for injuries producing death, see § 11-7-13.
Liability for violation of boating law, see §§ 59-21-157 et seq.
Criminal liability for death by overloading boat, see § 97-3-41.

JUDICIAL DECISIONS

1. In General.

The limitation period does not condition the right of action under the statute. *Triplett v. United States*, 213 F. Supp. 887 (S.D. Miss. 1963).

Actions under the statute are, since the amendment of 1908, governed by the general statute of limitations. *Triplett v. United States*, 213 F. Supp. 887 (S.D. Miss. 1963).

RESEARCH REFERENCES

ALR. Liability for injury or damage by motorboat. 63 A.L.R.2d 343.

Liability of owner or operator of pleasure boat for injury or death of guest passenger. 35 A.L.R.4th 104.

When is death "instantaneous" for purposes of wrongful death or survival action. 75 A.L.R.4th 151.

Modern status of rule imputing motor vehicle driver's negligence to passenger on joint venture theory. 3 A.L.R.5th 1.

Federal view as to effect of conditions appearing on back or margin of passenger's ticket for ocean voyage. 5 A.L.R. Fed. 394.

Applicability of Jones Act (46 USCS

§ 688) to foreign seamen, foreign ships, or other foreign circumstances. 68 A.L.R. Fed. 360.

Am Jur. 2 Am. Jur. 2d, Admiralty §§ 163-172.

CJS. 2 C.J.S., Admiralty §§ 70, 74, 75.

§§ 11-7-177 and 11-7-179. Repealed.

Repealed by Laws, 1991, ch. 573, § 141, eff from and after July 1, 1991.

§ 11-7-177. [Codes, 1880, § 1732; 1892, § 751; 1906, § 813; Hemingway's 1917, § 601; 1930, § 605; 1942, § 1549]

§ 11-7-179. [Codes, 1880, § 1733; 1892, § 752; 1906, § 814; Hemingway's 1917, § 602; 1930, § 606; 1942, § 1550]

Editor's Note — Former § 11-7-177 pertained to rendering judgment according to the rights of the parties.

Former § 11-7-179 authorized the rendering of as many verdicts and judgments as necessary to adjust the rights of the parties.

§ 11-7-181. Office confession of judgment; how made.

A person indebted to another in any sum of money within the jurisdiction of the circuit court, on any promise, agreement, or covenant, may sign an office confession of judgment in the clerk's office of the circuit court, in the manner following, to wit: The creditor shall file in the clerk's office a statement, under oath, substantially to the effect following, viz.:

"The State of Mississippi, _____ County.

In the circuit court of said county, _____ day of _____, A.D. _____ . _____ states, on oath, that _____ is justly indebted to him for the amount of _____ dollars on an instrument of writing in the following words and figures, viz.: (here copy the same), and in case of indorsement say indorsed as follows: (here copy the indorsement), or on open account, of which a copy is hereto attached, which remains due and unpaid, and that said sum of money is not due or claimed under a fraudulent or usurious consideration.

(Signed) _____

"Sworn to and subscribed the _____ day of _____ A. D. _____ before me. " _____, Clerk."

And if the evidence of the debt be in writing, the same shall be filed with said statement; and if not in writing, then a copy of the open account shall be filed; and the party indebted shall sign, before the clerk, an acknowledgment written upon or annexed to such statement, to the effect following, to wit:

"I do hereby acknowledge myself indebted to the said _____ in the sum of _____ Dollars, which includes interest up to the first day of the next term of the said circuit court, and I give my consent for judgment to be rendered against me in favor of said _____, at the next term of said circuit court for said amount and all legal costs accruing thereon, with stay of execution (if any) until (as may be agreed upon).

"Taken and acknowledged the _____ day of _____, A.D. _____, before me.

" _____, Clerk."

SOURCES: Codes, Hutchinson's 1848, ch. 61, art. 6 (1); 1857, ch. 61, art. 257; 1871, § 827; 1880, § 1734; 1892, § 753; Laws, 1906, § 815; Hemingway's 1917, § 603; Laws, 1930, § 607; Laws, 1942, § 1551.

Cross References — Judgment on confession releasing errors, see § 11-7-187.
Recovery of attorney's fees in suit on open account, see § 11-53-81.

JUDICIAL DECISIONS

1. In general.

A state's statutes and rules whereby a confession of judgment, pursuant to a contractual cognovit provision, may be entered without notice or hearing by a prothonotary or clerk of a county court, upon application by the plaintiff who although required to mail notice to the defendant within 20 days after entry of judgment, may issue a writ of execution before the notice is mailed and whereby the defendant, to obtain relief by striking or opening the judgment, must assert prima facie grounds for relief and must persuade the court to open the judgment, are not uncon-

stitutional on their face as violative of due process; under appropriate circumstances a cognovit debtor may be held effectively and legally to have waived those rights he would possess if the document he signed had contained no cognovit provision. *Swarb v. Lennox*, 405 U.S. 191, 92 S. Ct. 767, 31 L. Ed. 2d 138 (1972), reh'g denied, 92 S. Ct. 1303, 405 U.S. 1049, 31 L. Ed. 2d 592 (1972).

The fact that a note on which judgment was confessed was not due when the judgment was rendered does not deprive the circuit court of jurisdiction. *Black v. Pattison*, 61 Miss. 599 (1884).

RESEARCH REFERENCES

ALR. Validity and enforceability of judgment entered in sister state under a warrant of attorney to confess judgment. 39 A.L.R.2d 1232.

Am Jur. 46 Am. Jur. 2d, Judgments §§ 228 et seq.

15 Am. Jur. Pl & Pr Forms, (Rev), Judgments, Forms 211-225 (judgments by confession).

CJS. 49 C.J.S., Judgments §§ 138; 142 et seq.

§ 11-7-183. Office confession of judgment; how made final.

When such statement and acknowledgment are filed, the clerk shall docket the cause on the appearance docket, and at the next term on the motion of the plaintiff, the court shall render judgment thereon for the amount acknowledged to be due, with interest from the first day of the term, and with such stay of execution, if any, as may be stipulated; and such judgment shall be final unless set aside during the term, and shall be as binding and obligatory as a judgment rendered in any other form; and a full and complete final record shall be made therein as in other cases.

SOURCES: Codes, Hutchinson's 1848, ch. 61, art. 6 (1); 1857, ch. 61, art. 258; 1871, § 828; 1880, § 1735; 1892, § 754; Laws, 1906, § 816; Hemingway's 1917, § 604; Laws, 1930, § 608; Laws, 1942, § 1552.

Cross References — Duty of clerk to make final record of proceedings, see § 9-7-127.

JUDICIAL DECISIONS

1. In general.

A state's statutes and rules whereby a confession of judgment, pursuant to a contractual cognovit provision, may be entered without notice or hearing by a prothonotary or clerk of a county court, upon application by the plaintiff who, although required to mail notice to the defendant within 20 days after entry of judgment, may issue a writ of execution before the notice is mailed, and whereby the defendant, to obtain relief by striking or opening the judgment, must assert *prima facie* grounds for relief and must persuade the

court to open the judgment, are not unconstitutional on their face as violative of due process; under appropriate circumstances a cognovit debtor may be held effectively and legally to have waived those rights he would possess if the document he signed had contained no cognovit provision. *Swarb v. Lennox*, 405 U.S. 191, 92 S. Ct. 767, 31 L. Ed. 2d 138 (1972), reh'g denied, 92 S. Ct. 1303, 405 U.S. 1049, 31 L. Ed. 2d 592 (1972).

The lien of such judgment only takes effect from confirmation. *Bass v. Estill*, 50 Miss. 300 (1874).

RESEARCH REFERENCES

ALR. Payment by obligor on note or other instrument containing warrant of attorney to confess judgment as extending time within which power to confess may be exercised. 35 A.L.R.2d 1452.

Am Jur. 46 Am. Jur. 2d, Judgments §§ 228, 258-263.

CJS. 49 C.J.S., Judgments §§ 169-181.

§ 11-7-185. Office confession of judgment; void in certain cases.

A judgment rendered on office confession shall be void in toto as to third parties, if tainted with fraud or usury.

SOURCES: Codes, 1892, § 755; Laws, 1906, § 817; Hemingway's 1917, § 605; Laws, 1930, § 609; Laws, 1942, § 1553.

RESEARCH REFERENCES

Am Jur. 46 Am. Jur. 2d, Judgments § 262.

CJS. 49 C.J.S., Judgments § 180.

§ 11-7-187. Judgment on confession as release of errors.

A judgment on confession shall be equal to a release of all errors; but all powers of attorney for confessing or suffering judgment to pass by default or otherwise, and all general releases of error made or to be made by any person before action brought, shall be absolutely null and void.

SOURCES: Codes, Hutchinson's 1848, ch. 61, art. 1 (94); 1857, ch. 61, art. 185; 1871, § 626; 1880, § 1728; 1892, § 747; Laws, 1906, § 809; Hemingway's 1917, § 597; Laws, 1930, § 601; Laws, 1942, § 1545.

Cross References — Execution docket in chancery court, see § 9-5-217.

Form of office confession of judgment, see § 11-7-181.

Power and letters of attorney, see §§ 87-3-1 et seq.

JUDICIAL DECISIONS

1. In general.

The statute will not prohibit an appeal from a confessed judgment rendered by a

justice of the peace. *James v. Woods*, 65 Miss. 528, 5 So. 106 (1888).

RESEARCH REFERENCES

ALR. Res judicata as affected by fact that former judgment was entered by agreement or consent. 2 A.L.R.2d 514.

Consent decree as affecting title to real estate in another state. 2 A.L.R.2d 1188.

Constitutionality, construction, application, and effect of statute invalidating powers of attorneys to confess judgment or contracts giving such power. 40 A.L.R.3d 1158.

Modern views of state courts as to whether consent judgment is entitled to res judicata or collateral estoppel effect. 91 A.L.R.3d 1170.

Am Jur. 47 Am. Jur. 2d, Judgments § 1103.

CJS. 49 C.J.S., Judgments § 169.

§ 11-7-189. Enrollment of judgments; satisfaction.

(1) The clerk of the circuit court shall procure and keep in his office one or more books to be styled "The Judgment Roll," which book or books shall be appropriately divided under the several letters of the alphabet, and on each page shall be placed the following captions:

Defendant's Name and Name of Defendant's Attorney and Post Office Address of Each	Amount of Judgment or Decree	Date of Rendition	County and Court in Which Rendered	Social Security or Tax Identification Number
Date, Hour and Minute of Enrollment	Plaintiff's Name, Plaintiff's Attorney, and Post Office Address of Each		When and How Satisfied	Remarks

The clerk shall, within twenty (20) days after the adjournment of each term of court, enroll all final judgments rendered at that term in the order in which they were entered on the minutes by entering on The Judgment Roll, under the proper letter or letters of the alphabet, the name of each and every defendant to such judgment, the post office address of each defendant, and the social security or tax identification number of each defendant if such information is known or readily ascertainable, and if such defendant or defendants have an attorney at law in such case the name and post office address of such

attorney or firm of attorneys if such post office address is known or readily ascertainable; the amount of such judgment; date of rendition; county and court in which rendered; the date, hour and minute of enrollment; and the name of the plaintiff or plaintiffs and the post office address of each plaintiff if readily ascertainable, and if represented by an attorney at law or a firm of attorneys then the name and post office address of such attorney or firm of attorneys if the post office address is known or readily ascertainable. The name of the attorney or firm of attorneys and post office addresses of the parties may be subsequently inserted by the clerk at any time.

Notwithstanding the foregoing, the failure to list a social security number on a judgment shall not invalidate said judgment nor shall it make the party failing to list said judgment liable for such failure to list or the recording official liable for such failure.

(2) Any attorney of record representing a plaintiff or plaintiffs in the case may, for and on behalf of his client or clients, satisfy in whole or in part a judgment on such Judgment Roll by endorsing thereon the extent of such satisfaction and signing an entry so showing, and when so satisfied the clerk shall attest and subscribe such endorsement under the proper heading therein. When any judgment shall otherwise be satisfied, the clerk shall so enter under proper heading and subscribe the entry.

(3) The Judgment Roll may be kept on computer as provided in Section 9-7-171. In such case the plaintiff or attorney representing such plaintiff shall present to the clerk a sworn affidavit directing the clerk to cancel or otherwise show as satisfied the judgment recorded under this section.

SOURCES: Codes, Hutchinson's 1848, ch. 61, art. 16 (12); 1857, ch. 61, art. 260; 1871, § 829; 1880, § 1736; 1892, § 756; Laws, 1906, § 818; Hemingway's 1917, § 606; Laws, 1930, § 610; Laws, 1942, § 1554; Laws, 1946, ch. 437; Laws, 1960, ch. 233, §§ 1, 2; Laws, 1994, ch. 521, § 27; Laws, 1994, ch. 458, § 8; Laws, 1997, ch. 342, § 1, eff from and after July 1, 1997.

Cross References — Enrollment of money decrees from chancery court, see § 9-5-159.

Uniform enforcement of foreign judgments, see §§ 11-7-301 et seq.

Lis pendens record in chancery court, see § 11-47-1.

Enrollment of notice of lien for franchise taxes, see §§ 27-13-29 et seq.

Enrollment of notice of lien for sales taxes, see § 27-65-57.

Enrollment of warrant for collection of tobacco tax, see § 27-69-41.

Enrollment of warrant for collection of wine and beer tax, see § 27-71-333.

Enrollment of warrant for collection of contributions to employment security commission, see §§ 71-5-367, 71-5-369.

Satisfaction of judgment by surety, see § 87-5-9.

JUDICIAL DECISIONS

1. In general.
2. Date lien attaches.
3. Property subject to lien.
4. Priority.

1. In general.

Judgment lien of United States obtained in proceeding in Federal district court is subject, under applicable Federal

statutes, to state statutes (Code 1942, §§ 733, 735, 1554, 1555), governing the enrollment of judgments and limiting the duration of the lien thereof to seven years, notwithstanding provision of § 104, Constitution of 1890, that statutes of limitation in civil cases shall not run against the state, or any subdivision or municipal corporation thereof. *United States v. Williams-Richardson Co.*, 206 Miss. 378, 40 So. 2d 177 (1949).

The enrollment of a judgment against two persons, partners, under the letter of the name of one only, does not bind the property of the other. *Hughes v. Lacock*, 63 Miss. 112 (1885).

2. Date lien attaches.

A judgment enrolled on January 3, 1961, within 20 days after its rendition, did not relate back to the date of its rendition, December 13, 1960, to give the judgment creditor a specific lien on property which the judgment debtor had conveyed to third parties on November 29, 1960, the deed being filed for record on December 14, 1960. *Herrington v. Heidelberg*, 244 Miss. 364, 141 So. 2d 717 (1962), overruling *Clark v. Duke*, 59 Miss. 575 (1882), insofar as it is in conflict with the later decision.

While as between the judgment creditor and debtor, a judgment enrolled within 20 days relates back to the date of rendition of the judgment, and is valid as a deed or other conveyance, the judgment, as to third parties, takes effect and has priority only from the date of its enrollment. *Herrington v. Heidelberg*, 244 Miss. 364, 141 So. 2d 717 (1962), overruling *Clark v. Duke*, 59 Miss. 575 (1882), insofar as it is in conflict with the later decision.

Judgment enrolled after time allowed clerk for enrolling judgment did not affect rights of bona fide purchaser for value purchasing property before enrollment but after judgment was rendered. *Kalmia Realty & Ins. Co. v. Hopkins*, 163 Miss. 556, 141 So. 903 (1932).

Attorney's fees held not recoverable as damages for wrongful act in levying execution where judgment creditors and sheriff acted on advice of counsel, though erroneous, that under this section [Code 1942, § 1554] and Code 1942, § 1555, the lien of the judgment in question related

back to the rendition of the judgment. *Kalmia Realty & Ins. Co. v. Hopkins*, 163 Miss. 556, 141 So. 903 (1932).

3. Property subject to lien.

A judgment enrolled on January 3, 1961, within 20 days after its rendition, did not relate back to the date of its rendition, December 13, 1960, to give the judgment creditor a specific lien on property which the judgment debtor had conveyed to third parties on November 29, 1960, the deed being filed for record on December 14, 1960. *Herrington v. Heidelberg*, 244 Miss. 364, 141 So. 2d 717 (1962), overruling *Clark v. Duke*, 59 Miss. 575 (1882), insofar as it is in conflict with the later decision.

Enrollment and entry of judgment by judgment creditor on judgment roll of the county did not give the judgment creditor a lien on judgment debtor's cotton which judgment debtor sold and delivered to a third person, and the judgment creditor was not entitled to recover the value of the cotton from third person where no execution or other process was ever issued or levied on the cotton, despite the fact that the statute provides that enrolled judgment shall be a lien on all property of judgment debtor within the county. *Willis Hdwe. Co. v. Clark*, 216 Miss. 84, 61 So. 2d 441 (1952).

A judgment enrolled in the county became a lien on all the property of the defendant subject to execution, notwithstanding an appeal with supersedeas was immediately taken after the rendition of the judgment and before it was enrolled. *Williams & Freeman v. Bosworth*, 102 Miss. 160, 59 So. 6 (1912).

4. Priority.

While as between the judgment creditor and debtor, a judgment enrolled within 20 days relates back to the date of rendition of the judgment, and is valid as a deed or other conveyance, the judgment, as to third parties, takes effect and has priority only from the date of its enrollment. *Herrington v. Heidelberg*, 244 Miss. 364, 141 So. 2d 717 (1962), overruling *Clark v. Duke*, 59 Miss. 575 (1882), insofar as it is in conflict with the later decision.

Expenses of last illness and funeral expenses constitute preference claim over

enrolled judgment upon which execution has not been issued and levied. *Dabney v.*

Continental Jewelry Co., 163 Miss. 1, 140 So. 338 (1932).

RESEARCH REFERENCES

ALR. Necessity of notice of application or intention to correct error in judgment entry. 14 A.L.R.2d 224.

Right of judgment creditor to demand that debtor's tender of payment be in cash or by certified check rather than by uncer-

tified check. 82 A.L.R.3d 1199.

Am Jur. 47 Am. Jur. 2d, Judgments §§ 1093 et seq.

CJS. 49 C.J.S., Judgments §§ 112 et seq.

§ 11-7-191. Enrolled judgment as lien.

A judgment so enrolled shall be a lien upon and bind all the property of the defendant within the county where so enrolled, from the rendition thereof, and shall have priority according to the order of such enrollment, in favor of the judgment creditor, his representatives or assigns, against the judgment debtor and all persons claiming the property under him after the rendition of the judgment. A judgment shall not be a lien on any property of the defendant thereto unless the same be enrolled. In counties having two (2) judicial districts, a judgment shall operate as a lien only in the district or districts in which it is enrolled. Any judgment for the purpose described in Section 85-3-52 shall not be a lien on any property in this state, real, personal or mixed, that is owned by a resident of this state, and shall not be enforced or satisfied against any such property.

SOURCES: Codes, *Hutchinson's* 1848, ch. 61, art. 14 (1); 1857, ch. 61, art. 261; 1871, § 830; 1880, § 1737; 1892, § 757; Laws, 1906, § 819; *Hemingway's* 1917, § 607; Laws, 1930, § 611; Laws, 1942, § 1555; Laws, 1995, ch. 565, § 3, eff from and after July 1, 1995.

Cross References — Uniform enforcement of foreign judgments, see §§ 11-7-301 et seq.

Lien of enrolled judgment of justice court, see § 11-9-129.

Writ of execution in absence of judgment lien, see § 13-3-139.

Execution and garnishment on enrolled judgments and decrees, see § 13-3-155.

Duty of officer making execution sale to apply proceeds according to priority of liens, see § 13-3-181.

Limitation of actions on judgments, see §§ 15-1-43 et seq.

Preference of purchase-money mortgage, see § 89-1-45.

Provisions relative to judgments in the amount of overdue child support payments, see § 93-11-71.

JUDICIAL DECISIONS

1. In general.
2. When lien attaches.
3. Property subject to lien.
4. —After-acquired property.
5. Persons affected; bona fide purchasers.

6. Priority.
7. Effect of appeal; affirmance of judgment.

1. In general.

Judgment lien of United States obtained in proceeding in Federal district

court is subject, under applicable Federal statutes, to state statutes (Code 1942, §§ 733, 735, 1554, 1555), governing the enrollment of judgments and limiting the duration of the lien thereof to seven years, notwithstanding provision of § 104, Constitution of 1890, that statutes of limitation in civil cases shall not run against the state, or any subdivision or municipal corporation thereof. *United States v. Williams-Richardson Co.*, 206 Miss. 378, 40 So. 2d 177 (1949).

The object of enrollment is to protect the rights of persons who should become purchasers. *Josselyn v. Stone*, 28 Miss. 753 (1855).

The rights of the state are not affected by the enrollment laws. *Josselyn v. Stone*, 28 Miss. 753 (1855).

2. When lien attaches.

Deeds and instruments made prior to *lis pendens* notice but not recorded until after notice has been given are made subject to the *lis pendens* notice, after an interest has been established by recorded judgment by operation of law. *Jones v. Jones*, 249 Miss. 322, 161 So. 2d 640 (1964).

While as between the judgment creditor and debtor, a judgment enrolled within 20 days relates back to the date of rendition of the judgment, and is valid as a deed or other conveyance, the judgment, as to third parties, takes effect and has priority only from the date of its enrollment. *Herrington v. Heidelberg*, 244 Miss. 364, 141 So. 2d 717 (1962), overruling *Clark v. Duke*, 59 Miss. 575 (1882), insofar as it is in conflict with the later decision.

Lien under alimony decree cannot arise, if at all, until default in payment of installments. *Harris v. Worsham*, 164 Miss. 74, 143 So. 851 (1932).

Judgment lien relates back to date of rendition of judgment only when enrolled within time allowed to clerk for enrolling judgment. *Kalmia Realty & Ins. Co. v. Hopkins*, 163 Miss. 556, 141 So. 903 (1932).

Under this [Code 1942, § 1555] and the preceding section [Code 1942, § 1554], a judgment does not become a lien unless enrolled within twenty days provided for, and after such twenty days it is not a lien unless enrolled; title passing from judgment debtor to third person for a consid-

eration before an enrollment of judgment is not affected thereby. *Johnson v. Cole Mfg. Co.*, 144 Miss. 482, 110 So. 428 (1926). See as an exception *Perry Nugent & Co. v. Priebusch*, 61 Miss. 402 (1883).

The only difference with regard to the lien of a judgment rendered by the circuit court and one rendered by a justice of the peace is that the first, upon enrollment, becomes a lien and binds the property of defendant from the rendition thereof, while the lien of the latter attaches only from the date of its enrollment. *Minshe v. Geo. W. Davidson & Co.*, 86 Miss. 354, 38 So. 315 (1905).

The lien can attach to money only from its seizure. *Cahn v. Person*, 56 Miss. 360 (1879).

3. Property subject to lien.

Once a judgment is obtained and duly enrolled, the judgment becomes a lien on all property of the judgment debtor situated within the county; The lien follows the property and may be enforced against the property wherever it may be found within the county, without regard to intervening right of any third party. *Merideth v. United States*, 327 F. Supp. 429 (N.D. Miss. 1970), *aff'd*, 449 F.2d 186 (5th Cir. 1971).

Enrollment and entry of judgment by judgment creditor on judgment roll of the county did not give the judgment creditor a lien on judgment debtor's cotton which judgment debtor sold and delivered to a third person, and the judgment creditor was not entitled to recover the value of the cotton from third person where no execution or other process was ever issued or levied on the cotton, despite the fact that the statute provides that enrolled judgment shall be a lien on all property of judgment debtor within the county. *Willis Hdwe. Co. v. Clark*, 216 Miss. 84, 61 So. 2d 441 (1952).

A judgment lien on land includes a lien on the timber thereon, before and after the timber is cut off. *Stuart v. Pickett*, 193 Miss. 455, 10 So. 2d 207 (1942).

Where a husband and wife joined in a conveyance of the timber on his land, which was subject to a judgment lien against him, and, the land thereafter having been forfeited to the state for taxes, the husband, who was insolvent, induced

the purchaser of the timber to advance him sufficient money out of the balance due him on the purchase price with which to purchase the state's title to the land, and thereupon paid the money to the state, receiving the state's deed in his wife's name, the title vested in the husband, and not in his wife, and so was subject to the judgment lien, and the judgment creditor was entitled to recover the unpaid balance of the timber contract. *Stuart v. Pickett*, 193 Miss. 455, 10 So. 2d 207 (1942).

Decree allowing solicitor fee in partition cause was not subject to lien of judgment against solicitor. *Bank of Monticello v. L.D. Powell Co.*, 159 Miss. 183, 130 So. 292 (1930).

Under this [Code 1942, § 1555] and the preceding section [Code 1942, § 1554] a judgment does not become a lien unless enrolled within twenty days provided for, and after such twenty days it is not a lien unless enrolled; title passing from judgment debtor to third person for a consideration before an enrollment of judgment is not affected thereby. *Johnson v. Cole Mfg. Co.*, 144 Miss. 482, 110 So. 428 (1926). See as an exception *Perry Nugent & Co. v. Priebusch*, 61 Miss. 402 (1883).

A voucher for the payment of money due is not subject to the lien of an enrolled judgment and its negotiability is unaffected thereby. *R.F. Walden & Co. v. Yates*, 111 Miss. 631, 71 So. 897 (1916).

An enrolled judgment is not a lien upon a debt due judgment defendant. *Bryan v. Henderson Supply Co.*, 107 Miss. 255, 65 So. 242 (1914).

A judgment creditor has the same rights to property that a judgment debtor had, and no other. *Candler v. Cromwell*, 101 Miss. 161, 57 So. 554 (1912).

A deed of trust or mortgage becomes a lien upon a growing crop, but a judgment does not attach to a growing crop. *Candler v. Cromwell*, 101 Miss. 161, 57 So. 554 (1912).

A voluntary partition by agreement between tenants in common will not affect a judgment creditor of one of them. *Simmons v. Gordon*, 98 Miss. 316, 53 So. 623, Am. Ann. Cas. 1913A, 1143 (1910).

The statute only relates to judgments against the defendant from whom the

money has been collected; and applies only to money made by a sale under execution. *Johnson v. Edde*, 58 Miss. 664 (1881).

A judgment-creditor takes in execution the property of his debtor subject to every liability under which the debtor himself held it at the time of the rendition of the judgment, and subject to all equities which exist at the time in favor of third persons, except where otherwise provided by statute. *Walton v. Hargroves*, 42 Miss. 18 (1868); *Foute v. Fairman*, 48 Miss. 536 (1873), overruled in part by *Haughton v. Sartor*, 71 Miss. 357, 15 So. 71 (1893).

The lien extends to the money produced by sale under execution as well as to the property sold. *Smith v. Everly*, 5 Miss. (4 Howard) 178 (1839).

The removal of property out of the county after the lien has attached does not destroy it. *Chilton v. Cox*, 15 Miss. (7 S. & M.) 791 (1846).

4. —After-acquired property.

The judgment, if enrolled, becomes a lien on after-acquired property from the date of its acquisition. *Jenkins v. Gowen*, 37 Miss. 444 (1859); *Cayce v. Stovall*, 50 Miss. 396 (1874); *Moody v. Doe*, 25 Miss. 484 (1852); *Cooper v. Turnage*, 52 Miss. 431 (1876).

5. Persons affected; bona fide purchasers.

Under Mississippi law, a statutory lien on the property of a judgment debtor situated in the county of enrollment follows the property, but the lien statutes do not authorize a money judgment against one who disposes of the property. *Merideth v. United States*, 327 F. Supp. 429 (N.D. Miss. 1970), aff'd, 449 F.2d 186 (5th Cir. 1971).

Judgment enrolled after time allowed to clerk for enrolling judgment did not affect rights of bona fide purchaser for value purchasing property before enrollment but after judgment was rendered. *Kalmia Realty & Ins. Co. v. Hopkins*, 163 Miss. 556, 141 So. 903 (1932).

Judgment creditor held not to have released lien on automobile by authorizing release of first levy of execution. Purchaser of automobile from judgment creditor held charged with knowledge of stat-

utory lien of judgment creditor. *Gerlach-Barklow Co. v. Ellett*, 145 Miss. 60, 111 So. 92 (1927).

Where a judgment was rendered and enrolled by mistake against a wrong party, it cannot be corrected thereafter between the right parties so as to affect the rights of bona fide purchasers intervening. *Allen W. Comm'n Co. v. Millstead*, 92 Miss. 837, 46 So. 256 (1908); *Stone v. Threefoot Bros. & Co.*, 99 Miss. 15, 54 So. 595 (1910).

The lien of a judgment duly enrolled binds the property in the hands of a subvendee or more remote purchaser from the defendant. *Mitchell v. Wood*, 47 Miss. 231 (1872).

6. Priority.

Judgment creditors who had obtained judgment liens under the Mississippi judgment lien statutes were held to be judgment lien creditors for the purposes of being excepted from the federal tax lien statute and thus were entitled to priority over the tax claims of the Internal Revenue Service. *Merideth v. United States*, 327 F. Supp. 429 (N.D. Miss. 1970), *aff'd*, 449 F.2d 186 (5th Cir. 1971).

The lien of judgment in a suit commenced prior to the four months preceding the filing of a bankruptcy petition, to set aside a conveyance as fraudulent, is not affected by the bankruptcy. *Davis v. Polk Fin. Serv.*, 242 Miss. 419, 135 So. 2d 175 (1961).

Where the trustee in bankruptcy abandoned property owned by the debtor which had brought less than the amount of either of the liens of a chattel mortgagee or judgment creditor when sold, the proceedings in bankruptcy did not affect the rights of the lienholders, and the holder of the judgment lien retained priority to the funds. *Brookhaven Bank & Trust Co. v. Gwin*, 253 F.2d 17 (5th Cir. 1958).

A recorded deed of trust, containing an erroneous description of the land conveyed by the grantor, which recited that the land in question contained 60 acres more or less, whereas the grantor only owned 40 acres, was not sufficient to put the grantor's judgment creditors on notice that an entirely different tract of land was intended to be included, and did not give notice of a description which a diligent

search of the records might have disclosed as to other lands belonging to the grantor, so that while the grantee was entitled to a reformation of a trust deed as against the grantor, he was not so entitled as against the judgment creditors, who had executed on the lands actually owned by the grantor. *Mississippi Indus. for Blind v. Jackson*, 231 Miss. 135, 95 So. 2d 109 (1957).

Expenses of last illness and funeral expenses constitute preference claim over enrolled judgment upon which execution has not been issued and levied. *Dabney v. Continental Jewelry Co.*, 163 Miss. 1, 140 So. 338 (1932).

Without deciding the point, it would seem that the lien of an enrolled judgment creditor under this statute is stronger and more far-reaching than that of an execution judgment creditor, and would prevail over the lien of a purchase money creditor. *In re Whatley*, 30 F.2d 979 (S.D. Miss. 1929).

The priority given by the statute is lost as against subsequent judgment creditors, and therefore in bankruptcy proceedings, by such holder agreeing to stay execution on his judgment and acting in pursuance of such agreement until bankruptcy supervenes. *Winchester-Simmons Co. v. Phillips*, 16 F.2d 109 (5th Cir. 1926).

One year's provision for a widow is superior to the lien of an enrolled judgment against her husband before his death. *First Nat'l Bank v. Donald*, 112 Miss. 681, 73 So. 723 (1917).

Where a motion to set aside a judgment for a certain sum is continued and overruled at a subsequent term, but the judgment is allowed to stand for a less sum, a judgment recovered and enrolled during the interval is prior in lien. *Crane v. Richardson*, 73 Miss. 254, 18 So. 542 (1895).

Even without notice to the senior judgment creditor, a junior judgment creditor is entitled to the proceeds of goods seized and sold under his judgment, pending a stay of execution granted by the senior judgment itself. *Virden v. Robinson*, 59 Miss. 28 (1881).

Where a creditor refuses to give an indemnifying bond, and another creditor does give it, and a sale is made because

thereof, the latter will have a superior right to the proceeds. *Townsend v. Henry*, 26 Miss. 203 (1853); *Dabney v. Stackhouse*, 49 Miss. 513 (1873).

Where several judgments are rendered against a defendant on the same day, the judgment which appears first entered on the minutes of the court obtains a prior lien. *President of Bank of Metropolis v. President of New England Bank*, 42 U.S. 234, 11 L. Ed. 115 (1843), appeal after remand, 47 U.S. 212, 12 L. Ed. 409 (1848); *John Reed & Co. v. Haviland, Harral & Co.*, 38 Miss. 323 (1860); *Johnson v. Edde*, 58 Miss. 664 (1881); *Herron v. Walker*, 69 Miss. 707, 12 So. 259 (1892).

If a creditor suspend his execution, he loses his priority of lien. *Michie v. Plant-*

ers' Bank, 5 Miss. (4 Howard) 130 (1839); *Smith v. Everly*, 5 Miss. (4 Howard) 178 (1839).

7. Effect of appeal; affirmance of judgment.

A judgment of affirmance in Supreme Court neither satisfies, merges, nor extinguishes the judgment below; and though it be a judgment on the appeal bond against the principal and his sureties, it does not extinguish or destroy the lien of the original judgment. *Planters' Bank v. Calvit*, 11 Miss. (3 S. & M.) 143 (1844); *Kilpatrick v. Dye*, 12 Miss. (4 S. & M.) 289 (1845); *Montgomery v. McGimpsey*, 15 Miss. (7 S. & M.) 557 (1846).

RESEARCH REFERENCES

ALR. Priority between attorney's lien for fees against a judgment and lien of creditor against same judgment. 34 A.L.R.4th 665.

Am Jur. 46 Am. Jur. 2d, Judgments §§ 360 et seq.

15 Am. Jur. Pl & Pr Forms (Rev), Judgments, Form 601.1 (Petition or application — To foreclose judgment lien — De-

fendant filing for bankruptcy — Plaintiff erroneously not included as judgment creditor).

CJS. 50 C.J.S., Judgments §§ 551 et seq.

Law Reviews. The Effect of Bankruptcy and Encumbrances on Mineral Interests in Mississippi. 53 Miss. L. J. 551, December, 1983.

§ 11-7-193. How priority of lien forfeited.

A junior judgment creditor may give written notice to any senior judgment creditor requiring him to execute his judgment; and if the senior judgment creditor, being so notified, shall fail, neglect or refuse to have execution issued, and levied within ten days from said notice for the satisfaction of his judgment, he shall lose his priority, and the junior judgment creditor may cause execution to issue on his judgment and to be levied on any of the property of the defendant, and the proceeds of a sale thereof shall be applied to the junior judgments so levied.

SOURCES: Codes, 1857, ch. 61, art. 261; 1871, § 830; 1880, § 1737; 1892, § 758; Laws, 1906, § 820; Hemingway's 1917, § 608; Laws, 1930, § 612; Laws, 1942, § 1556.

Cross References — Loss of priority in attachment, see § 11-33-53. Execution on judgments, see §§ 13-3-155 et seq.

JUDICIAL DECISIONS

1. In general.

The rule that an agreement to waive or postpone execution or laches in the issuance thereof is a fraud upon junior judgment creditors has been superseded by the enactment of a provision fixing a reasonable time of ten days within which the holder of the senior judgment must act or lose his lien. *In re Gulfport Furn. Co.*, 1 F. Supp. 489 (S.D. Miss. 1932).

By failure to give the statutory notice to the holder of the senior judgment, the junior creditor is deemed to acquiesce in delay. *In re Gulfport Furn. Co.*, 1 F. Supp. 489 (S.D. Miss. 1932).

Mere delay in withholding a writ of execution without an agreement to do so will not affect the judgment creditor's priority of lien. *In re Gulfport Furn. Co.*, 1 F. Supp. 489 (S.D. Miss. 1932).

The junior creditor having given the notice and the senior having failed to do as required of him, the former has a prior lien. *Curry v. Lampkin & Conner*, 51 Miss. 91 (1875).

The section [Code 1942, § 1556] applies to living plaintiffs, who can legally enforce their judgments. *Dibble v. Norton*, 44 Miss. 158 (1870).

RESEARCH REFERENCES

ALR. Priority between attorney's lien for fees against a judgment and lien of creditor against same judgment. 34 A.L.R.4th 665.

Am Jur. 46 Am. Jur. 2d, Judgments §§ 392 et seq.

CJS. 50 C.J.S., Judgments §§ 580 et seq.

§ 11-7-195. Judgment not a lien out of county unless enrolled.

A judgment or decree rendered in any court of the United States or of this state shall not be a lien upon or bind any property of the defendant situated out of the county in which the judgment or decree was rendered until the plaintiff shall file in the office of the clerk of the circuit court of the county in which such property is situated an abstract of such judgment or decree which has been certified by the clerk of the court in which the same was rendered containing the names of all the parties to such judgment or decree, its amount, the social security or tax identification number of the defendant if such information is known or readily ascertainable, the date of the rendition, and the amount appearing to have been paid thereon, if any. It shall be the duty of the clerk of the circuit court on receiving such abstract and on payment of the fees allowed by law for filing and enrolling the same, to file and forthwith enroll the same on The Judgment Roll, as in other cases. Such judgment or decree shall, from the date of its enrollment, be a lien upon and bind the property of the defendant within the county where it shall be so enrolled. If a foreign judgment has been filed in any county of this state pursuant to Sections 11-7-301 through 11-7-309 and such judgment may be enforced in such county, then, for purposes of this section, such judgment shall be treated as if it had been rendered in such county and may be enrolled on The Judgment Roll in other counties pursuant to the provisions of this section. Any judgment for the purpose described in Section 85-3-52 shall not be a lien on any property in this state, real, personal or mixed, that is owned by a resident of this state and shall not be enforced or satisfied against any such property.

SOURCES: Codes, Hutchinson's 1848, ch. 61, art. 14 (3); 1857, ch. 61, art. 262; 1871, § 833; 1880, § 1738; 1892, § 759; Laws, 1906, § 821; Hemingway's 1917, § 609; Laws, 1930, § 613; Laws, 1942, § 1557; Laws, 1991, ch. 416, § 1; Laws, 1995, ch. 565, § 4; Laws, 1997, ch. 342, § 2, eff from and after July 1, 1997.

Cross References — Uniform enforcement of foreign judgments, see §§ 11-7-301 et seq.

JUDICIAL DECISIONS

1. In general.
2. Court has no enforcement authority once judgment enrolled.

1. In general.

The lien of an enrolled judgment does not attach to intangible property, such as vouchers for the payment of money and the right to receive money, and until service of a writ of garnishment or other appropriate writ subjecting such intangible property to the judgment, the lien is inchoate and does not attach. *Simmons-Belk, Inc. v. May*, 283 So. 2d 592 (Miss. 1973).

A judgment does not become a lien until an abstract thereof be filed and the judgment be enrolled, and the lien has priority from the time of the filing and enrolling. *Bergen v. State*, 58 Miss. 623 (1881); *Hamilton-Brown Shoe Co. v. Walker*, 67 Miss. 197, 6 So. 713 (1889).

This statute (Laws of 1841, Feb. 6) did not abrogate a lien which had been acquired under a judgment previously obtained, although the latter had not been recorded in the manner required by the statute. *Massingill v. Downs*, 48 U.S. 760, 7 How. 760, 12 L. Ed. 903 (1849).

2. Court has no enforcement authority once judgment enrolled.

Dismissal of the judgment creditor's garnishment proceeding was proper where the circuit court lacked any authority to entertain the enforcement action of a judgment rendered in federal district court; no authority was vested in the circuit court over the collection of the judgment once the clerk had enrolled the judgment. *Buckley v. Pers. Support Sys.*, 852 So. 2d 648 (Miss. Ct. App. 2003).

RESEARCH REFERENCES

ALR. Judgment of court of foreign country as entitled to enforcement or extraterritorial effect in state court. 13 A.L.R.4th 1109.

Am Jur. 46 Am. Jur. 2d, Judgments §§ 377 et seq.

CJS. 50 C.J.S., Judgments § 542.

§ 11-7-197. Judgment not a lien in county until enrolled.

Judgments and decrees, at law or in equity, rendered in any court of the United States held within this state, or in the Supreme Court or the court of chancery of this state, shall not be a lien upon or bind the property of the defendant within the county in which such judgments or decrees may be rendered, until an abstract thereof shall be filed in the office of the clerk of the circuit court of the county and enrolled on the judgment roll, in the manner and on the terms hereinbefore provided in Section 11-7-195. Such judgments and decrees shall bind the property of the defendants from the date of such enrollment, in like manner as judgments and decrees rendered in a different county and so enrolled.

SOURCES: Codes, 1857, ch. 61, art. 263; 1871, § 834, 1880, § 1739; 1892, § 760; Laws, 1906, § 822; Hemingway's 1917, § 610; Laws, 1930, § 614; Laws, 1942, § 1558.

Cross References — Duty of chancery clerk to furnish circuit clerk with abstract of money decrees, see § 9-5-159.

Uniform enforcement of foreign judgments, see §§ 11-7-301 et seq.

Record of decrees making partition of land, see § 11-21-37.

Limitation of action on foreign judgment, see § 15-1-45.

JUDICIAL DECISIONS

1. In general.
2. Court has no enforcement authority once judgement enrolled.

1. In general.

Although inmate could have enrolled bankruptcy court's judgment fixing amount the lawyer owed the inmate as a result of the lawyer's breach of agreement and obtained a judgment lien as a result, the evidence did not show that the inmate did so; as a result, the trial court did not err in denying his motion for writ of garnishment. *Estelle v. Robinson*, 805 So. 2d 623 (Miss. Ct. App. 2002).

2. Court has no enforcement authority once judgement enrolled.

Dismissal of the judgment creditor's garnishment proceeding was proper where the circuit court lacked any authority to entertain the enforcement action of a judgment rendered in federal district court; no authority was vested in the circuit court over the collection of the judgment once the clerk had enrolled the judgment. *Buckley v. Pers. Support Sys.*, 852 So. 2d 648 (Miss. Ct. App. 2003).

RESEARCH REFERENCES

Am Jur. 46 Am. Jur. 2d, Judgments §§ 370 et seq.

CJS. 50 C.J.S., Judgments §§ 569 et seq.

§ 11-7-199. Growing crop not subject to judgment lien.

A growing crop shall not be subject to the lien of a judgment.

SOURCES: Codes, 1880, § 1764; 1892, § 761; Laws, 1906, § 823; Hemingway's 1917, § 611; Laws, 1930, § 615; Laws, 1942, § 1559.

Cross References — Provision for growing crops in cases of unlawful entry and detainer, see § 11-25-115.

Prohibition against levying execution on growing crops, see § 13-3-137.

Duty of executor with respect to crop growing at the time of death of testator, see § 91-7-169.

JUDICIAL DECISIONS

1. In general.

When cotton is ready to harvest, it is not "growing crop", and judgment lien then attaches. *Harris v. Harris*, 150 Miss. 729, 116 So. 731 (1928).

Trust deed, executed after levy by sheriff under execution upon matured ungathered crop of cotton, cannot prevail as against judgment creditor. *Harris v. Harris*, 150 Miss. 729, 116 So. 731 (1928).

RESEARCH REFERENCES

Am Jur. 46 *Am. Jur. 2d*, Judgments §§ 374 et seq. **CJS.** 50 *C.J.S.*, Judgments § 572.

§ 11-7-201. Revival not necessary for execution.

It shall not be necessary to revive a judgment by scire facias because no execution shall have been issued on such judgment within a year and a day after its rendition, but execution may be issued without such revival.

SOURCES: Codes, 1857, ch. 61, art. 266; 1871, § 838; 1880, § 1741; 1892, § 762; Laws, 1906, § 824; Hemingway's 1917, § 612; Laws, 1930, § 616; Laws, 1942, § 1560.

Cross References — Revival of judgment by scire facias, see § 13-3-153.

RESEARCH REFERENCES

ALR. Reviving, renewing, or extending judgment by order entered after statutory limitation period on motion made or proceeding commenced within such period. 52 *A.L.R.2d* 672. **Am Jur.** 46 *Am. Jur. 2d*, Judgments §§ 422-463. **CJS.** 50 *C.J.S.*, Judgments §§ 640-655.

§§ 11-7-203 through 11-7-209. Repealed.

Repealed by Laws, 1991, ch. 573, § 141, eff from and after July 1, 1991.

§ 11-7-203. [Codes, 1880, § 1756; 1892, § 763; 1906, § 825; Hemingway's 1917, § 613; 1930, § 617; 1942, § 1561]

§ 11-7-205. [Codes, Hutchinson's 1848, ch. 61, art. 1 (145); 1857, ch. 61, art. 162; 1871, § 644; 1880, § 1715; 1892, § 733; 1906, § 974; Hemingway's 1917, § 578; 1930, § 587; 1942, § 1531]

§ 11-7-207. [Codes, 1880, § 1718; 1892, § 735; 1906, § 796; Hemingway's 1917, § 580; 1930, § 589; 1942, § 1533]

§ 11-7-209. [Codes, 1857, ch. 61, art. 164; 1871, § 646; 1880, § 1717; 1892, § 737; 1906, § 798; Hemingway's 1917, § 586; 1930, § 590; 1942, § 1534]

Editor's Note — Former § 11-7-203 provide for suspension of judgment.

Former § 11-7-205 was entitled: Bills of exceptions — in civil cases.

Former § 11-7-207 was entitled: When bills of exceptions signed.

Former § 11-7-209 was entitled: Exceptions, bill of — when attorneys may sign.

§ 11-7-211. Bills of exception may be amended.

Bills of exception, with the approval of the trial judge, may be amended at any time before the hearing on appeal, for the purpose of curing omissions, defects, or inaccuracy; but no such amendment shall be made until the parties interested shall have been given five days' notice of such proposed amendment.

SOURCES: Codes, 1906, § 799; Hemingway's 1917, § 587; Laws, 1930, § 591; Laws, 1942, § 1535.

Cross References — Another section derived from same 1942 code section, see § 99-17-45.

JUDICIAL DECISIONS

1. In general.

A proposed amendment to a bill of exceptions, which gave some support to the defendant's allegation that he had requested and been denied a preliminary examination, was not properly a part of the record in the case, where the amendment had not been approved or consented to by the trial court. *Stevenson v. State*, 244 So. 2d 30 (Miss. 1971).

Corrections of errors in bill of exceptions, where testimony is taken down by court's stenographer, must take place in trial court, except as provided by this section [Code 1942, § 1535]. *Williams v. W.M. Hardee & Son*, 140 Miss. 151, 106 So. 16 (1925).

The trial court may amend a special bill of exceptions before the expiration of the term of court. *Archer v. State*, 140 Miss. 597, 105 So. 747 (1925).

This section [Code 1942, § 1535] has no application where an instruction is marked "given" by the court and also marked "filed" by the clerk, for such instruction then becomes a part of the record. *Gulf Coast Stevedoring Co. v. Gibbs*, 124 Miss. 188, 86 So. 582 (1920).

To amend a bill of exceptions the trial judge must consent thereto. *Ladnier v. Ingram Day Lumber Co.*, 122 Miss. 577, 84 So. 385 (1920).

RESEARCH REFERENCES

ALR. Amendment of record of judgment in state civil case to correct judicial errors and omissions. 50 A.L.R.5th 653.

Am Jur. 5 Am. Jur. 2d, Appellate Review § 507.

CJS. 4 C.J.S., Appeal and Error §§ 132, 476.

§§ 11-7-213 and 11-7-215. Repealed.

Repealed by Laws, 1991, ch. 573, § 141, eff from and after July 1, 1991.

§ 11-7-213. [Codes, Hutchinson's 1848, ch. 61, art. 1 (73); 1857, ch. 61, art. 165; 1871, § 647; 1880, § 1719; 1892, § 738; 1906, § 800; Hemingway's 1917, § 588; 1930, § 592; 1942, § 1536; Laws 1956, ch. 230]

§ 11-7-215. [Codes, 1857, ch. 61, art. 168; 1871, § 648; 1880, § 1720; 1892, § 739; 1906, § 801; Hemingway's 1917, § 589; 1930, § 593; 1942, § 1537]

Editor's Note — Former § 11-7-213 directed that new trials be granted only on terms directed by the court and two to same party.

Former § 11-7-215 was entitled: New trials — That only two be granted to the same parts granting or refusing assignable for error.

§ 11-7-217. Executions of fines, penalties, and forfeitures.

The clerk of the circuit court shall, immediately after the adjournment of every term, issue execution according to the nature of the case, for all fines, penalties and forfeitures assessed by the court, or which shall have accrued to the state or to the county, and remaining due and unpaid. Said clerk shall, within thirty days after such adjournment, transmit a list of said executions to

the clerk of the board of supervisors of the county, noting the names of the defendants, the amounts, and the sheriff or other officer to whom the same was delivered; and, at the same time, he shall transmit to said clerk a statement of the returns made by the sheriff or other officer on execution for fines, penalties, and forfeitures returnable to the last term of the court. Any circuit court clerk who shall fail to issue such executions, or to transmit the lists thereof as required, shall forfeit and pay the sum of two hundred dollars for every such offense, to be recovered by the state or county, on motion against him and his sureties by the district attorney, before the circuit court. The clerk of the board of supervisors shall notify the district attorney of such default.

SOURCES: Codes, 1857, ch. 61, art. 304; 1871, § 867; 1880, § 1785; 1892, § 764; Laws, 1906, § 826; Hemingway's 1917, § 614; Laws, 1930, § 618; Laws, 1942, § 1562.

Cross References — Duty of justice of the peace to collect and report fines, see § 9-11-19.

Collection of costs, see § 11-53-69.

Duty of clerk of board of supervisors, see § 19-3-27.

Duty of district attorney as to fines and penalties, see § 25-31-23.

Another section derived from same 1942 code section, see § 99-19-65.

RESEARCH REFERENCES

Am Jur. 15A Am. Jur. 2d, Clerks of **CJS.** 21 C.J.S., Courts §§ 236-265.
Court §§ 28, 32.

§ 11-7-219. Remedy against officers, failing to return fines.

If any sheriff or other officer shall return on any such writ of execution, that he hath levied the fine, penalty, or forfeiture therein mentioned, or any part thereof; or, that he hath taken the body of the defendant, and shall have suffered such defendant to escape; or, if any person be committed to the custody of such sheriff or other officer until the fine, penalty, or forfeiture for which he was committed shall be paid, and such sheriff or officer shall permit such defendant to escape; or, if such sheriff or officer shall have received such fine, penalty, or forfeiture, or any part thereof, and shall not immediately account to the clerk of the board of supervisors and pay the same into the treasury of the county, then, in either of the cases above specified, it shall be the duty of said clerk to notify the district attorney of such default, who shall thereupon, on motion at the next term of the circuit court, demand judgment against such sheriff, or other officer, and his sureties, for the fines, penalties, and forfeitures mentioned in such writs, or for so much thereof as he shall have received on such execution or commitment, or the whole amount thereof in case he shall have suffered such defendant or defendants to escape; and the court shall give judgment accordingly, and award execution thereon.

SOURCES: Codes, 1857, ch. 61, art. 308; 1871, § 869; 1880, § 1788; 1892, § 766; Laws, 1906, § 828; Hemingway's 1917, § 616; Laws, 1930, § 619; Laws, 1942, § 1563.

Cross References — Actions against officers for money collected or property taken, see §§ 9-7-89, 11-23-3.

Liability of justice of the peace for money collected, see § 9-11-23.

Failure of constable to execute and return execution, see § 19-19-9.

Liability of sheriff for mishandling money collected, see §§ 19-25-39 et seq.

Duty of legal representative to promptly pay public monies of deceased officer, see § 25-1-67.

Duty and liability of public officer for depositing and distributing public funds, see §§ 25-1-69 to 25-1-73.

Another section derived from same 1942 code section, see § 99-19-67.

RESEARCH REFERENCES

Am Jur. 63C Am. Jur. 2d, Public Officers and Employees §§ 341-361. **CJS.** 67 C.J.S., Officers §§ 149-162.

§ 11-7-221. Liability of officers for default as to fines.

Clerks, sheriffs, and other officers shall be liable to the same proceedings for any neglect of duty, in respect to executions for fines, penalties, and forfeitures, as in case of executions in civil cases.

SOURCES: Codes, 1857, ch. 61, art. 308; 1871, § 869; 1880, § 1788; 1892, § 766; Laws, 1906, § 828; Hemingway's 1917, § 616; Laws, 1930, § 620; Laws, 1942, § 1564.

Cross References — Motions against officers for money collected, see § 9-7-89.

Another section derived from same 1942 code section, see § 99-19-69.

JUDICIAL DECISIONS

1. In general.

A clerical omission to place an order on the minutes of the proper term is always

subject to correction at any succeeding term. Powers v. State, 83 Miss. 691, 36 So. 6 (1904).

RESEARCH REFERENCES

Am Jur. 63C Am. Jur. 2d, Public Officers and Employees §§ 343, 344, 351, 352, 365. **CJS.** 67 C.J.S., Officers §§ 157-161.

UNIFORM ENFORCEMENT OF FOREIGN JUDGMENTS

SEC.

- | | |
|-----------|---|
| 11-7-301. | Definition. |
| 11-7-303. | Filing copy of foreign judgment; enforcement. |
| 11-7-305. | Affidavit of filing; notice; execution. |
| 11-7-307. | Appeal; stay of execution; security. |
| 11-7-309. | Alternative rights of judgment creditor. |

§ 11-7-301. Definition.

In this act “foreign judgment” means any judgment, decree or order of a court of the United States or of any other court which is entitled to full faith and credit in this state.

SOURCES: Laws, 1984, ch. 403, § 1, eff from and after July 1, 1984.

Cross References — Foreign judgment, lien, see § 11-7-195.

Comparable Laws from other States — Alabama Code, § 6-9-230 to 6-9-238.

Arkansas Code Annotated, §§ 16-66-601 to 16-66-608.

Georgia Code Annotated, §§ 9-12-130 to 9-12-138.

Louisiana Revised Statutes Annotated, §§ 13:4241 to 13:4247.

Tennessee Code Annotated, §§ 26-6-101 to 26-6-107.

Texas Civil Practice and Remedies Code, §§ 35.001 to 35.008.

JUDICIAL DECISIONS

1. Courts.

A judgment rendered by a so-called “Constitutional District Court of Common Law” in Arkansas simply did not exist in the eyes of the Constitution or statutes of the United States, the states of Mississippi, Arkansas or any other state and,

therefore, such judgment was not enforceable in Mississippi under the Uniform Enforcement of Foreign Judgments Act. *Tennessee Properties, Inc. v. Southern Pilot Ins. Co.*, 766 So. 2d 44 (Miss. Ct. App. 2000).

RESEARCH REFERENCES

ALR. Uniform Enforcement of Foreign Judgment Act. 72 A.L.R.2d 1255.

Requirement of full faith and credit to foreign judgment for punitive damages. 44 A.L.R.3d 960.

Construction and application of Uniform Foreign Money — Judgment Recognition Act. 100 A.L.R.3d 792.

Validity, construction, and application of Uniform Enforcement of Foreign Judgments Act. 31 A.L.R.4th 706.

Construction and application of Uniform Foreign Money — Judgments Recognition Act. 88 A.L.R.5th 545.

Am Jur. 47 Am. Jur. 2d Judgments §§ 966 et seq.

15 Am. Jur. Pl & Pr Forms (Rev), Judgments, Form 89 (petition or application for registration of foreign judgment).

CJS. 50 C.J.S. Judgments § 983.

Law Reviews. Hoffheimer, Mississippi Conflict of Laws. 67 Miss. L. J. 175 1997.

§ 11-7-303. Filing copy of foreign judgment; enforcement.

A copy of any foreign judgment authenticated in accordance with the act of Congress or the statutes of this state or any rule promulgated and adopted by the Mississippi Supreme Court may be filed in the office of the clerk of the circuit court of any county in this state. Said clerk shall treat the foreign judgment in the same manner as a judgment of the circuit court of any county in this state. A judgment so filed has the same effect and is subject to the same procedures, defenses and proceedings for reopening, vacating or staying as a judgment of a circuit court of any county in this state and may be enforced or satisfied in like manner, subject to the provisions of Section 15-1-45. Any foreign judgment for the purpose described in Section 85-3-52 shall not be a

lien on any property in this state, real, personal or mixed, that is owned by a resident of this state, and shall not be enforced or satisfied against any such property.

SOURCES: Laws, 1984, ch. 403, § 2; Laws, 1991, ch. 371, § 1; Laws, 1995, ch. 565, § 5, eff from and after July 1, 1995.

Cross References — Foreign judgment, lien, see § 11-7-195.

JUDICIAL DECISIONS

1. In general.
2. Requirements.

1. In general.

Mississippi is required by the United States Constitution, Art. IV, Sec. 1, to give full faith and credit to all final judgments of other states and federal courts unless (1) the foreign judgment was obtained as a result of some false representation without which the judgment would not have been rendered, or (2) the rendering court did not have jurisdiction over the parties or the subject matter; however, in order to challenge a foreign judgment on this ground, it is necessary that the challenge be timely and properly filed in Mississippi pursuant to § 15-1-45. *Davis v. Davis*, 558 So. 2d 814 (Miss. 1990).

In order for full faith and credit to apply, the foreign court must have addressed the merits of the case in rendering its judgment. However, this general rule does not apply if the rendering court did not have jurisdiction over the parties or the subject matter or if the foreign judgment itself was obtained as a result of some false representation without which the judgment would not have been rendered. If a foreign judgment is collaterally attacked on subject matter grounds, the court may consider extrinsic evidence only to show that the foreign judgment is void. When the attack is on grounds of extrinsic fraud, a distinction must be made between fraud involving the merits and fraud which enables a party to procure a judgment that he or she otherwise would not have obtained. *Davis v. Davis*, 558 So. 2d 814 (Miss. 1990).

The procedure for properly enrolling a foreign judgment in Mississippi is as fol-

lows: (1) the judgment creditor must file an affidavit and a copy of the foreign judgment with the circuit court; (2) the circuit clerk promptly mails notice to the judgment debtor; and (3) no action may be taken for 20 days after the foreign judgment is filed. *Davis v. Davis*, 558 So. 2d 814 (Miss. 1990).

The requirements of full faith are tempered by some basic limitations. The primary limitation is that full faith and credit does not apply if the rendering court did not have jurisdiction over the parties in the subject matter. When a foreign judgment is collaterally attacked on subject matter grounds, extrinsic evidence is admissible, but only to show that the foreign judgment is void. The courts of this state may inquire into no question other than those which would be considered upon collateral attack in the state in which the judgment was rendered. If the law of the state where the judgment was obtained would require the courts of that state to grant relief to the judgment debtor, this state will similarly grant relief. *Sollitt v. Robertson*, 544 So. 2d 1378 (Miss. 1989).

2. Requirements.

Dismissal of the judgment creditor's garnishment proceeding was proper where the circuit court lacked any authority to entertain the enforcement action of a judgment rendered in federal district court; the clerk issued the writ returnable to the circuit court, an act not authorized until the requirements of the Uniform Enforcement of Foreign Judgments Act (Act), Miss. Code Ann. §§ 11-7-301 to 11-7-309, were met. *Buckley v. Pers. Support Sys.*, 852 So. 2d 648 (Miss. Ct. App. 2003).

§ 11-7-305. Affidavit of filing; notice; execution.

(1) At the time of the filing of the foreign judgment, the judgment creditor or his lawyer shall make and file with the clerk of the circuit court, as the case may be, an affidavit setting forth the name and last known post office address of the judgment debtor and the judgment creditor.

(2) Promptly upon the filing of the foreign judgment and the affidavit, the clerk shall mail notice of the filing of the foreign judgment to the judgment debtor at the address given and shall make a note of the mailing in the docket. The notice shall include the name and post office address of the judgment creditor and the judgment creditor's lawyer, if any, in this state. In addition, the judgment creditor may mail a notice of the filing of the judgment to the judgment debtor and may file proof of mailing with the clerk. Lack of mailing notice of filing by the clerk shall not affect the enforcement proceedings if proof of mailing by the judgment creditor has been filed.

(3) No execution or other process for enforcement of a foreign judgment filed hereunder shall issue until twenty (20) days after the date the judgment is filed.

SOURCES: Laws, 1984, ch. 403, § 3, eff from and after July 1, 1984.

Cross References — Foreign judgment, lien, see § 11-7-195.

JUDICIAL DECISIONS**1. In general.**

The procedure for properly enrolling a foreign judgment in Mississippi is as follows: (1) the judgment creditor must file an affidavit and a copy of the foreign judgment with the circuit court; (2) the circuit clerk promptly mails notice to the judgment debtor; and (3) no action may be taken for 20 days after the foreign judgment is filed. *Davis v. Davis*, 558 So. 2d 814 (Miss. 1990).

An ex-husband's filing of a suit in tort against his ex-wife was not a proper response to her attempt to enforce foreign judgments for unpaid child support and

attorney's fees, in spite of his argument that the law suit was a consolidated answer to the efforts to enroll and execute on the 4 judgments. Even if the law suit were a timely and proper response, it would otherwise fail because the record reflected proper notice in accordance with § 11-7-301 et seq., and the "response" collaterally attacked the validity and amounts of the underlying judgments which may not be attacked in Mississippi. Thus, the judgments were entitled to full faith and credit in Mississippi. *Davis v. Davis*, 558 So. 2d 814 (Miss. 1990).

§ 11-7-307. Appeal; stay of execution; security.

(1) If the judgment debtor shows the circuit court of any county that an appeal from the foreign judgment is pending or will be taken, or that a stay of execution has been granted, the court shall stay enforcement of the foreign judgment until the appeal is concluded, the time for appeal expires, or the stay of execution expires or is vacated, upon proof that the judgment debtor has furnished the security for the satisfaction of the judgment required by the state in which it was rendered.

(2) If the judgment debtor shows the circuit court of any county any ground upon which enforcement of a judgment of any court of this state would be stayed, the court shall stay enforcement of the foreign judgment for an appropriate period, upon requiring the same security for satisfaction of the judgment which is required in this state.

SOURCES: Laws, 1984, ch. 403, § 4, eff from and after July 1, 1984.

Cross References — Foreign judgment, lien, see § 11-7-195.

JUDICIAL DECISIONS

1. In general.

An ex-husband's filing of a suit in tort against his ex-wife was not a proper response to her attempt to enforce foreign judgments for unpaid child support and attorney's fees, in spite of his argument that the law suit was a consolidated answer to the efforts to enroll and execute on the 4 judgments. Even if the law suit were a timely and proper response, it would

otherwise fail because the record reflected proper notice in accordance with § 11-7-301 et seq., and the "response" collaterally attacked the validity and amounts of the underlying judgments which may not be attacked in Mississippi. Thus, the judgments were entitled to full faith and credit in Mississippi. *Davis v. Davis*, 558 So. 2d 814 (Miss. 1990).

RESEARCH REFERENCES

Law Reviews. 1984 Mississippi Supreme Court Review: Civil Procedure. 55 Miss. L.J. 49, March, 1985.

§ 11-7-309. Alternative rights of judgment creditor.

The right of a judgment creditor to bring an action to enforce his judgment instead of proceeding under this act remains unimpaired.

SOURCES: Laws, 1984, ch. 403, § 5, eff from and after July 1, 1984.

Cross References — Foreign judgment, lien, see § 11-7-195.

CHAPTER 9

Practice and Procedure in County Courts and Justice Courts

Article 1.	County Courts	11-9-1
Article 3.	Justice Courts	11-9-101

ARTICLE 1.

COUNTY COURTS.

SEC.

- 11-9-1. Writs returnable to other courts may be made returnable to county court; acts of justice court judge, clerk, judge, chancellor, or other officer may be done in behalf of county court.
- 11-9-3. Venue of actions, suits and proceedings.

§ 11-9-1. Writs returnable to other courts may be made returnable to county court; acts of justice court judge, clerk, judge, chancellor, or other officer may be done in behalf of county court.

Whenever under any statute a writ is made returnable to, or the institution of any suit or proceeding is required to be in, a justice court, general or special, or a circuit or chancery court, or when in respect to such matters any justice court judge, or clerk, or judge or chancellor, or other officer, is empowered to do any act in or about any of said courts, the said writs may be made returnable to the county court in any cause or matter there pending or which, within its jurisdiction, is there to be instituted, and all the said acts of the officers aforesaid may be done in behalf of or in respect to the county court in all such matters and causes to the same extent as had the county court been expressly included in each and every of such statutes first aforementioned.

SOURCES: Codes, 1930, § 696; Laws, 1942, § 1607; Laws, 1926, ch. 131; Laws, 1991, ch. 573, § 22, eff from and after July 1, 1991.

Cross References — Rules of pleading and practice in chancery courts in general, see §§ 11-5-1 et seq.

Rules of pleading in civil cases in circuit court, see §§ 11-7-1 et seq.

Application to all courts of circuit court civil practice provisions, see § 11-7-1.

Partition of personalty by county court or justice of the peace, see § 11-21-73.

Unlawful entry and detainer proceedings in county court, see §§ 11-25-101 et seq.

Rule that plaintiff's attorney must state residence of plaintiff upon demand of defendant, see § 11-49-1.

Rules of evidence generally, see 13-1-1 et seq.

Process, notice and publication generally, see 13-3-1 et seq.

Judges, terms, general powers and duties of county courts, see 9-9-1 et seq.

Suits against state or its political subdivisions, see 11-45-1 et seq.

Procedural rules applicable to civil actions, see Miss. R. Civ. P. 1 et seq.

Procedural rules applicable to practice in Mississippi circuit and county courts, see Uniform Rules of Circuit and County Court Practice, Rules 1.01 et seq.

JUDICIAL DECISIONS

1. In general.
2. Pleading and practice.

1. In general.

In a prosecution for contributing to the delinquency of a minor, where the affidavit was amended to add public drunkenness as an additional act and the record did not disclose any evidence as to surprise and there was no motion by defendant for continuance nor process for additional witnesses, the defendant could not now complain of the amendment. *Hall v. State*, 211 Miss. 90, 50 So. 2d 924 (1951).

The fact that a *capias* for arrest on a misdemeanor charge was issued on the affidavit of the county prosecuting attorney, by the clerk of the county court without any order therefor from the county judge, did not render it invalid, or avoid jurisdiction, by the court over the person of the defendant, since, inasmuch as the affidavit of the county prosecuting attorney took the place of an indictment in the circuit court, the process on the charge of misdemeanor so made was a *capias* to be issued by the clerk of the county court. *Cooper v. State*, 193 Miss. 672, 10 So. 2d 764 (1942).

To confer jurisdiction on county court in misdemeanor case, State need only allege and prove crime was committed in county. *Webb v. State*, 158 Miss. 715, 131 So. 262 (1930).

Rules of practice and procedure of justice, chancery, and circuit courts in cases within county court jurisdiction, and in force when county court was established, are applicable to county courts. *Speir v. Moseley*, 158 Miss. 63, 130 So. 53 (1930); *Forrest County v. Thompson*, 204 Miss. 628, 37 So. 2d 787 (1948).

2. Pleading and practice.

County court's allowance of an amendment correcting description of certain

tires and tubes and making the description applicable to both the declaration and affidavit, was proper exercise of its discretion in light of the fact that the defendants were not prejudiced. *Hannan Motor Co. v. Darr*, 212 Miss. 870, 56 So. 2d 64 (1952).

Since an action of replevin, prior to the creation of county courts, would have been in the jurisdiction of the circuit court, under this section, the procedure in such action in the county court must be the same that it would have been in the circuit court. *Winn v. Eatherly*, 187 Miss. 159, 192 So. 431 (1939).

Under this section [Code 1942, § 1607], an eminent domain proceeding should be tried in the county court upon a full hearing and the giving of appropriate instructions for the parties, as in other civil causes tried in such court, and it was error to limit the instruction to the one provided in Code 1942 § 2760, with respect to such proceedings before a justice of the peace, requiring a trial *de novo* in the circuit court. *Mississippi State Hwy. Comm'n v. Reddoch*, 184 Miss. 302, 186 So. 298 (1939).

In unlawful entry and detainer action in county court, error in pleadings held not to affect judgment where case was tried on merits on evidence that would have been proper and necessary had pleadings been in accord with statute. *Holmes v. Elmer*, 182 Miss. 171, 181 So. 325 (1938).

In view of the provision of this section [Code 1942, § 1607] that in all matters taken away from the jurisdiction of other courts and given to the jurisdiction of the county court, the pleadings, practice, and procedure shall be the same in the county court as in the courts formerly having jurisdiction of such matters, it is plain that the legislature did not intend to repeal in its entirety the chapter on eminent domain. *Mississippi State Hwy. Dep't v. Haines*, 162 Miss. 216, 139 So. 168 (1932).

§ 11-9-3. Venue of actions, suits and proceedings.

The venue of actions, suits and proceedings in the county court shall be the same as that now generally provided, or which may hereafter be provided with respect to the particular action, suit or proceedings. Provided, however, that all suits and matters filed in the county court which, if there were no county court,

would be triable in the justice court, shall be tried at the courthouse of the county or courthouse of the proper judicial district in counties having two (2) circuit and chancery court districts therein.

SOURCES: Codes, 1930, § 695; Laws, 1942, § 1606; Laws, 1926, ch. 131; Laws, 1981, ch. 471, § 23; Laws, 1982, ch. 423, § 28, made eff from and after January 1, 1984, or, with respect to a given county, from and after such earlier date as the county appoints a justice court clerk pursuant to § 9-11-27(3).

Editor's Note — See Editor's Note to § 11-9-101 for provisions governing effective dates of 1981 amendments affecting justice courts and justice court judges.

Cross References — Venue of civil actions or suits generally, see 11-11-1 et seq.

JUDICIAL DECISIONS

1. In general.

Jurisdiction of county court in misdemeanor case is coextensive with boundary

of county wherein offense was committed, and venue of crime is that county. *Webb v. State*, 158 Miss. 715, 131 So. 262 (1930).

RESEARCH REFERENCES

ALR. Venue in action for malicious prosecution. 12 A.L.R.4th 1278.

ARTICLE 3.

JUSTICE COURTS.

SEC.

- 11-9-101. Where suits to be brought.
- 11-9-103. If two or more defendants, where brought.
- 11-9-105. How suit begun in civil cases.
- 11-9-107. Service of process by sheriff or constable.
- 11-9-109. Person appointed to execute process.
- 11-9-111. Property and process delivered to office.
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- 11-9-115. Witnesses to be subpoenaed.
- 11-9-117. Form of entry on default of witness.
- 11-9-119. Form of scire facias for witness.
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- 11-9-123. Form of entry of judgment in such case.
- 11-9-125. Setoff filed on return day before trial.
- 11-9-127. Trial and judgment; execution.
- 11-9-129. Judgment operates as a lien if enrolled.
- 11-9-131. Execution not to be issued within ten days.
- 11-9-133. Form of an execution.
- 11-9-135. Proceedings in replevin, attachment, liens.
- 11-9-137. Judgment on merits res adjudicata.
- 11-9-139. Execution of judgment may be stayed.
- 11-9-141. Effect of stay.
- 11-9-143. Trial by jury.
- 11-9-145. Multiple cases tried by same jury.
- 11-9-147. Trial by jury; fining of delinquent jurors.

§ 11-9-101. Where suits to be brought.

(1) The jurisdiction of the justice court shall be coextensive with its county, and any process may be issued in matters within its jurisdiction, to be executed in any part of the county. Every defendant may be sued only in the county in which he resides or where the cause of action arose and if a defendant does not reside in the State of Mississippi or has no fixed place of residence, he shall be sued in the county where the cause of action arose. Whenever by reason of interest, relationship to one of the parties, or other like cause, any justice court judge shall be disqualified to preside in any case before him, the same shall be transferred to a justice court judge in the county, free from such objection, who shall hear and determine the same. Nothing herein contained shall be construed as authorizing or empowering the clerk of the justice court or any justice court judge to perform any official act outside of the territorial boundaries of their county.

(2) The provisions of this section shall not apply to any cause of action commenced before January 1, 1984; and any such action shall be concluded in accordance with state law as it was constituted before that date.

SOURCES: Codes, Hutchinson's 1848, ch. 50, art. 2 (10); 1857, ch. 58, art. 8; 1871, §§ 1303, 1340; 1880, §§ 2191, 2231; 1892, § 2395; Laws, 1906, § 2724; Hemingway's 1917, § 2223; Laws, 1930, § 2072; Laws, 1942, § 1806; Laws, 1955 Ex. ch. 40; Laws, 1960, ch. 238; Laws, 1981, ch. 471, § 1; Laws, 1982, ch. 423, § 1; Laws, 1992, ch. 389 § 1, eff from and after passage (approved April 27, 1992).

Editor's Note — Laws, 1981, ch. 471, § 60, provides as follows:

"SECTION 60. Section 8 of this act shall take effect and be in force from and after the date it is finally effectuated under Section 5 of the Voting Rights Act of 1965, as amended and extended. Sections 4, 48 and 59 of this act shall take effect and be in force from and after passage. Sections 17 and 22 of this act shall take effect and be in force from and after March 31, 1982. Sections 15, 16 and 58 of this act shall take effect and be in force from and after July 1, 1983. Sections 20, 23, 24, 25, 26, 27, 29, 30, 31, 34, 35, 36, 37, 38, 39, 41, 42, 46, 47, 49, 50, 51, 52, 54, 55, 56 and 57 of this act shall take effect from and after January 1, 1984, or with respect to a given county, from and after such earlier date as such county elects to employ a clerk for the justice court of such county in accordance with the provisions of subsection (3) of Section 7 of this act. Sections 9, 10, 18, 19 and 43 of this act shall take effect and be in force from and after January 1, 1984." (Amended by Laws, 1982, ch. 423, § 28, effective from and after March 31, 1982).

Cross References — Election, general powers and duties of justices of the peace, see Chapter 11 of Title 9.

Partition of personalty by county court or justice of the peace, see § 11-21-73.

Trial of right of property in justice of the peace court, see §§ 11-23-25 et seq.

Unlawful entry and detainer proceedings before justices of the peace, see §§ 11-25-1 et seq.

Attachment at law against debtors, see § 11-33-1 et seq.

Garnishment proceedings, see § 11-35-1 et seq.

Rules of evidence generally, see § 13-1-1 et seq.

Process, notice and publication generally, see § 13-3-1 et seq.

Where suits against incorporated cities, villages, or towns are to be brought, see § 21-1-5.

Prosecutions before justice of the peace, see § 99-33-1 et seq.

Procedural rules applicable to practice in Mississippi justice courts, see Uniform Rules of Procedure for Justice Court, Rules 1.01 et seq.

JUDICIAL DECISIONS

1. In general.
2. Jurisdiction in general.
3. Process.
4. Freeholders or householders determined.
5. Venue.
6. —District of defendant's residence.
7. —Where contract made or liability incurred.
8. —Situs of property.
9. —Actions against nonresidents.
10. Transfer of actions.
11. —Disqualification of justice.
12. Waiver.

1. In general.

Mississippi criminal statutory fees systems for compensating justices of the peace in Hinds and DeSoto Counties are violative of defendant's due process rights to trial before impartial tribunal under the Tumey-Ward test, where the possibility existed that judges in the aforementioned counties would compete for business by currying favor with arresting officers or taking biased actions to increase their case load, and where a judge might minimize the burden of proof required to convict the defendant or might be less than diligent in protecting the defendant's constitutional rights. *Brown v. Vance*, 637 F.2d 272 (5th Cir. 1981).

This section [Code 1942, § 1806] does not affect the provision (Code 1942, § 2955) requiring actions against a county to be brought in the court sitting at the county site, notwithstanding joinder of an individual as joint defendant. *Simpson v. Neshoba County*, 157 Miss. 217, 127 So. 692 (1930).

This section [Code 1942, § 1806] has no application to a bastardy proceeding which is governed by Code of 1892, § 249 [Code of 1942, § 383]. *Johnson v. Walker*, 86 Miss. 757, 39 So. 49, 109 Am. St. R. 733 (1905).

2. Jurisdiction in general.

Where a prosecution charging trespass upon land originated in the district of a certain justice of the peace, a justice of the

peace of another district of the same county was not without jurisdiction to try the case, since the jurisdiction of every justice of the peace is coextensive with his county, and he is authorized to issue any process in matters within his jurisdiction, to be executed in any part of his county. *Walker v. State*, 192 Miss. 409, 6 So. 2d 127 (1942).

Jurisdiction of justice of peace of transitory causes of action against nonresidents is as complete as that of circuit courts, except as to amount. *McDonough v. Stringer*, 155 Miss. 179, 124 So. 334 (1929).

A justice of the peace whose district is partly in two circuit court districts of the county may hold his court in either or both districts and will have entire jurisdiction of persons within his district, but appeals from his court to the circuit court must be to the circuit court of the district in which the suit is tried. *Woods v. Speer*, 127 Miss. 593, 90 So. 322 (1922).

Where a justice of the peace has two regular places in his district and alternates in holding his terms of court on certain days at specific places, a writ of garnishment on judgment rendered at one place may be returnable to the next regular term of his court at said place, although a regular intervening term of court may be held at the other place. *Edwards v. Kingston Lumber Co.*, 92 Miss. 598, 46 So. 69 (1908).

Under the Constitution providing for the election in each county by districts of justices of the peace, it is not in the power of the legislature to give the mayor of a town jurisdiction of a justice as to that part of the justice's district outside the town. *Heggie v. Stone*, 70 Miss. 39, 12 So. 253 (1892).

3. Process.

The 1960 amendment of this section [Code 1942, § 1806] does not limit the power of a justice of the peace to issue a search warrant outside his district. *Curtis v. State*, 247 Miss. 675, 158 So. 2d 693 (1963).

A justice of the peace can take an affidavit and issue a search warrant while he is physically outside of his district. *Curtis v. State*, 247 Miss. 675, 158 So. 2d 693 (1963).

Issuance of a search warrant by a justice of the peace of one district of the county from another justice of the peace district of the county did not make the search warrant and subsequent conviction of unlawful possession of intoxicating liquor void, since such issuance of the search warrant was not a judicial act and was authorized by this section [Code 1942, § 1806]. *McGowan v. State*, 189 Miss. 450, 196 So. 222 (1940).

A justice of the peace in one district of the county may issue warrant returnable before a justice of the peace of another district. *Goffredo v. State*, 145 Miss. 66, 111 So. 131 (1927).

4. Freeholders or householders determined.

Term "freeholder" within statute governing venue in actions triable before justice of peace refers to property. *Buckley v. Porter*, 160 Miss. 98, 133 So. 215 (1931).

Term "householder" within statute governing venue in actions triable before justice of peace refers to civil status of litigant and not to property. *Buckley v. Porter*, 160 Miss. 98, 133 So. 215 (1931).

Term "resides" within statute governing venue in actions triable before justice of peace means where person has settled abode for time. *Buckley v. Porter*, 160 Miss. 98, 133 So. 215 (1931).

Mother who with child rented land in L. county and made crop thereon held "householder" "residing" in such county within statute governing venue in justice court actions. *Buckley v. Porter*, 160 Miss. 98, 133 So. 215 (1931).

5. Venue.

6. —District of defendant's residence.

Where householder resides out of district of justice of peace before whom suit is brought, both justice and circuit court on appeal are without jurisdiction. *Buckley v. Porter*, 160 Miss. 98, 133 So. 215 (1931).

A debt contracted in the district in which a defendant lives and having a justice of the peace qualified to act therein

must be sued upon in the district of his residence. *Molpus v. Bostic Lumber & Mfg. Co.*, 110 Miss. 883, 71 So. 16 (1916).

A defendant freeholder or householder must be sued in the county of his residence regardless of where the debt was contracted. *Gibson Paving Co. v. Mills*, 95 Miss. 726, 49 So. 568 (1909).

To revive a judgment before a justice of the peace the suit must be brought for under \$200.00 in the district of the residence of the defendant who lives in another county. *Smith v. Eubank*, 89 Miss. 838, 43 So. 81 (1907).

An action on a justice's judgment is properly brought in the district in which the defendant resides rather than in the district in which the original judgment was procured. *Wise v. Keer Thread Co.*, 84 Miss. 200, 36 So. 244 (1904).

A suit upon a judgment rendered by a justice of the peace is properly brought before a justice of the district of defendant's residence, although it was rendered by a justice of a different district. *Wise v. Keer Thread Co.*, 84 Miss. 200, 36 So. 244 (1904).

A justice is without jurisdiction of a suit on a debt contracted in another justice's district of the county by a sole defendant who there resides and is a householder or freeholder of the county, there being in such other district a magistrate qualified to try the cause. *Hilliard v. Chew*, 76 Miss. 763, 25 So. 489 (1899).

A justice of the peace of a district other than the one where the defendant, a freeholder or householder, resides and other than the one where the property is found, has no jurisdiction of a replevin suit. *Turner v. Lilly*, 56 Miss. 576 (1879).

A justice of the peace has no jurisdiction of a suit alone against a freeholder or householder of another county. *Cain v. Simpson*, 53 Miss. 521 (1876).

7. —Where contract made or liability incurred.

A justice of the peace of the justice district of the county where contract is made, or liability incurred, may render judgment in suit thereon, although the defendant is a freeholder and householder of another justice district of the county and pleads to the jurisdiction. *Johnson v. Porter*, 143 Miss. 652, 109 So. 601 (1926).

A justice of the peace has jurisdiction of suits in tort occurring in his district even if defendant is a freeholder and householder of another justice of the peace district which has a competent justice to try cause. *Harper v. Adams*, 141 Miss. 806, 106 So. 354 (1925).

A debt contracted in the district in which a defendant lives and having a justice of the peace qualified to act therein must be sued upon in the district of his residence. *Molpus v. Bostic Lumber & Mfg. Co.*, 110 Miss. 883, 71 So. 16 (1916).

A nonresident executor appointed by the chancery court of a county in this state may be sued in a justice's court of another county if the contract sued upon was made in the justice's district in which the suit is brought and he be there personally served with process. *Williams v. Stewart*, 79 Miss. 46, 30 So. 1 (1901).

A justice is without jurisdiction of a suit on a debt contract in another justice's district of the county by a sole defendant who there resides and is a householder or freeholder of the county, there being in such other district a magistrate qualified to try the cause. *Hilliard v. Chew*, 76 Miss. 763, 25 So. 489 (1899).

8. —Situs of property.

An action to enforce a mechanic's lien upon an automobile is an action in rem and may be brought in the jurisdiction in which the auto is found. *West Point Motor Car Co. v. McGhee*, 122 Miss. 604, 84 So. 690 (1920).

Replevin can be brought in a county where the goods are found, even if the defendant be a freeholder resident of another county. *Ellison v. Lewis*, 57 Miss. 588 (1880).

A justice of the peace of a district other than the one where the defendant, a freeholder or householder, resides and other than the one where the property is found, has no jurisdiction of a replevin suit. *Turner v. Lilly*, 56 Miss. 576 (1879).

9. —Actions against nonresidents.

Action against a nonresident of the state may be brought in any justice of the peace district in which he may be found. *McDonough v. Stringer*, 155 Miss. 179, 124 So. 334 (1929).

A justice has jurisdiction to issue the writ and try the cause in an attachment suit against a nonresident, although the only property attached is in another district of the county, and this, too, where there is a qualified and acting justice in such other district. *Griggs v. Jesse French Piano & Organ Co.*, 70 Miss. 211, 14 So. 24 (1892).

10. Transfer of actions.

When on appeal from a justice's court the case is reversed for want of jurisdiction and papers are sent back and transferred to a justice having jurisdiction, the claimant of goods attached for rent is not entitled to be notified of the transfer. *Pierce v. Watkins*, 74 Miss. 394, 21 So. 148 (1896).

If a freeholder or householder be sued out of the proper district, the justice is without power to transfer the cause. He must dismiss it. *Cain v. Simpson*, 53 Miss. 521 (1876).

11. —Disqualification of justice.

Objection to disqualification of judge must be made before such judge loses control over his judgment by adjournment. *Dixon v. Rowland*, 143 Miss. 270, 108 So. 807 (1926).

Objection to disqualification of judge because of interest or relationship to party can be availed of only by objection made on that ground. Qualification of a justice of the peace, presiding in liquor prosecution, cannot be attacked collaterally in habeas corpus proceedings. *Dixon v. Rowland*, 143 Miss. 270, 108 So. 807 (1926).

A party to a suit before a disqualified justice, who has consented to call another justice to sit in his place, thereby getting substantially the benefit of a transfer to another justice, cannot thereafter complain of want of jurisdiction in the justice called in. *Cross v. Levy*, 57 Miss. 634 (1880).

12. Waiver.

The failure of the defendant to object to jurisdiction at the proper time is a waiver to the right. *Stanley v. Cruise*, 134 Miss. 542, 99 So. 376 (1924).

The right to be sued in the district of

residence may be waived by a defendant by his failure to appear and plead the

facts. *Catlett v. Drummond*, 113 Miss. 450, 74 So. 323 (1917).

ATTORNEY GENERAL OPINIONS

An individual may be instructed prior to filing an action that the county justice court might lack proper jurisdiction, but if the plaintiff still persists in filing the action in that court, the clerk should file the action and collect the proper fees; the justice court judge may, prior to issuing a

summons, order the case dismissed for lack of jurisdiction and, in such a case, the plaintiff would not be entitled to his filing fee but would be entitled to refund of the constable's fee. *Shirley*, Nov. 16, 2001, A.G. Op. #01-0697.

RESEARCH REFERENCES

ALR. Disqualification of judge for bias against counsel for litigant. 54 A.L.R.5th 575.

Am Jur. 47 Am. Jur. 2d, Justices of the Peace § 19.

CJS. 51 C.J.S., Justices of the Peace § 45.

Practice References. Young, Trial Handbook for Mississippi Lawyers § 27:9.

§ 11-9-103. If two or more defendants, where brought.

In suits or proceedings against two (2) or more defendants, jointly or jointly and severally liable, it shall be lawful to bring the suit in the justice court of the county wherein either of the defendants reside or where the cause of action arose; and such justice court shall have power to issue a summons or other process to bring in all codefendants from any other county.

SOURCES: Codes, 1871, § 1320; 1880, § 2192; 1892, § 2396; Laws, 1906, § 2725; Hemingway's 1917, § 2224; Laws, 1930, § 2073; Laws, 1942, § 1807; Laws, 1981, ch. 471, § 24; Laws, 1982, ch. 423, § 28; Laws, 1992, ch. 389 § 2, eff from and after passage (approved April 27, 1992).

Editor's Note — See Editor's Note to § 11-9-101 for provisions governing effective dates of 1981 amendments affecting justice courts and justice court judges.

Cross References — Venue of actions, generally, see § 11-11-1 et seq.

JUDICIAL DECISIONS

1. In general.

County must be sued in court having jurisdiction of amount sitting at county

site, though another person is named as joint defendant. *Simpson v. Neshoba County*, 157 Miss. 217, 127 So. 692 (1930).

RESEARCH REFERENCES

Am Jur. 47 Am. Jur. 2d, Justices of the Peace § 20.

CJS. 51 C.J.S., Justices of the Peace § 45.

§ 11-9-105. How suit begun in civil cases.

Anyone desiring to sue in the justice court shall lodge with the clerk of the justice court the evidence of debt, statement of account, or other written

statement of the cause of action. The clerk shall record all filings and shall, as far as practicable, assign the cases to each justice court judge in the county on a rotating basis to insure equal distribution of the cases among the judges of the county; however, in all counties in which the courtrooms provided by the county for use of the justice court judges are located in more than one (1) place in the county, the clerk, in addition to assigning cases to the judges on a rotating basis, may also assign a courtroom for each case, such assignment may be made based upon the proximity of the courtroom to the defendant's residence or place of business. The clerk shall issue a summons for the defendant, returnable to the next term of the court of the justice court judge to which the case is assigned, which shall be executed five (5) days before the return day; but if the process be executed less than five (5) days before the return day, the service shall be good to require the appearance of the defendant at the term next succeeding the one to which it is returnable. Any summons issued within five (5) days before a term of the court shall be made returnable to the next succeeding term, unless a shorter day be named, in pursuance of the provision for a trial without delay in the case of nonresident or transient defendants. When the case has been recorded and assigned and process issued, the clerk shall, within two (2) working days, forward certified copies of all documents pertaining to the case to the justice court judge to which the case is assigned for further processing.

SOURCES: Code, Hutchinson's 1848, ch. 50, art. 2 (9); 1857, ch. 58, arts. 7, 10; 1871, §§ 1305, 1310; 1880, §§ 2196, 2197; 1892, § 2401; Laws, 1906, § 2730; Hemingway's 1917, § 2229; Laws, 1930, § 2078; Laws, 1942, § 1812; Laws, 1981, ch. 471, § 13; Laws, 1982, ch. 423, § 10; Laws, 1991, ch. 551, § 1, eff from and after October 1, 1991.

Cross References — Prepayment of court costs as prerequisite to civil jurisdiction of justice of peace court, see § 9-11-10.

Trial out of term for nonresident or transient defendant in justice court, see § 9-11-15.

Assignment of cases by justice court clerk in manner provided by this section, see § 9-11-27.

Clerk of justice court assigning civil and criminal cases to justice court judges in accordance with subsection (3) of this section, see § 9-11-27.

Statute of limitations for actions brought on open accounts or unwritten contracts, see §§ 15-1-29, 15-1-31.

Commencement of action, see Rule 2.03, Uniform Rules of Procedure for Justice Court.

JUDICIAL DECISIONS

1. In general.
2. Filing cause of action.
3. Process.
4. Evidence, admissibility of.

1. In general.

Statement of account showing name of defendant, amount of claim for rent, and

period covered, held to give justice jurisdiction. *Oxford Spotless Cleaners v. Mayfield*, 157 Miss. 565, 128 So. 567 (1930).

Proceedings in justices' courts are treated with great indulgence, the substance and not the form thereof is to be considered. *A.B. Smith Co. v. Jones*, 75 Miss. 325, 22 So. 802 (1897).

2. Filing cause of action.

The account, required by the statute to be filed with the declaration of the plaintiff, must state distinctly the several items of his claim against the defendant, and the particular date of the item is a necessary part of that distinctness of item which the statute requires. *Griffith v. Goodin*, 202 Miss. 548, 32 So. 2d 743 (1947).

Failure of plaintiff in action to enforce a purchase money lien before a justice of the peace to attach the contract and note evidencing the transaction did not make the statement of the cause of action void where the affidavit for the writ of seizure clearly set out the cause of action, and it was not error in the circuit court on appeal to permit the plaintiff to attach them. *Parker v. McCaskey Register Co.*, 177 Miss. 347, 171 So. 337 (1936).

Written statement in declaration filed in justice court as to railroad's blocking switch, preventing loading logs, stated cause of action. *Mississippi Cent. R.R. v. May*, 149 Miss. 334, 115 So. 561 (1928).

Where the cause of action consists of a contract to pay rent which is filed with a statement that \$200.00 has been claimed thereon is sufficient for jurisdictional purpose. *Town v. H. Lupkin & Son*, 114 Miss. 693, 75 So. 546 (1917).

The original contract or cause of action is not required to be filed, but a copy will suffice. *Town v. H. Lupkin & Son*, 114 Miss. 693, 75 So. 546 (1917).

The cause of action or a copy thereof should be "lodged" with the justice of the peace. *Town v. H. Lupkin & Son*, 114 Miss. 693, 75 So. 546 (1917).

A mere affidavit that defendant "is justly indebted in the sum of \$160" to plaintiff, filed in a justice court, does not comply with this section [Code 1942, § 1812], requiring the filing of evidence of debt, statement of account, or other written statement of the cause of action. *Greenburg v. Massey*, 90 Miss. 121, 43 So. 1 (1907).

It is sufficient to file a copy of a promissory note with the justice. *Duncan v. Board of Supvrs.*, 64 Miss. 38, 8 So. 204 (1886).

3. Process.

Summons issued and returnable to a special day and not to the regular term of

justice court is not void but merely irregular; and where justice continued the cause to a date in the regular term, party summoned for such special day, having failed to appear on either day, was subject to default judgment. *McCormick Motor Car Co. v. McDonald*, 153 Miss. 409, 121 So. 121 (1929).

Judgment in justice of peace court, pursuant to summons returnable to past date, held of no effect. *Howell v. Kersh*, 152 Miss. 266, 119 So. 186 (1928).

A justice may authorize another to subscribe his name to a summons in his presence. *Gooch v. Glidewell*, 124 Miss. 16, 86 So. 705 (1921).

No valid judgment can be rendered without valid service of process or an appearance or waiver of process. *Boutwell v. Grayson*, 118 Miss. 80, 79 So. 61 (1918).

A constable cannot serve process outside of his district. *Boutwell v. Grayson*, 118 Miss. 80, 79 So. 61 (1918).

Each defendant to a judgment must be served with process to make the judgment valid as to all. *Carrollton Hdwe. & Implement Co. v. Marshall*, 117 Miss. 224, 78 So. 7 (1918).

An action is begun when summons is issued and does not relate back to time of filing cause of action where summons is delayed by plaintiff's instruction. *Stewart v. Pettit*, 94 Miss. 769, 48 So. 5 (1909).

A judgment of a justice in a civil case against two or more defendants is an entirety and being void as to one is void to all. *Comenitz v. Bank of Commerce*, 85 Miss. 662, 38 So. 35 (1904); *Boutwell v. Grayson*, 118 Miss. 80, 79 So. 61 (1918).

A judgment of a justice in a civil case against a defendant not a nonresident or transient person upon less than five days' service of process is void. *Comenitz v. Bank of Commerce*, 85 Miss. 662, 38 So. 35 (1904).

Service of a summons by a justice who issued it is void and does not confer jurisdiction over the person of the defendant. Code 1892, § 3445 [Code 1906, § 3944], authorizing the service of process in certain cases by justices of the peace does not empower a justice to serve a summons issued by himself. *McDugle v. Filmer*, 79 Miss. 53, 29 So. 996, 89 Am. St. R. 582 (1901).

4. Evidence, admissibility of.

Notes sued on in justice court, not shown by transcript to have been lodged with justice, held not admissible in circuit court. *Anthony v. Bassett*, 172 Miss. 206, 159 So. 854 (1935).

Where defendant did not, by sworn plea, deny execution of written instrument, referred to in plaintiff's statement of cause of action and made a part thereof as contemplated by this section [Code 1942, § 1812], evidence he did not execute

instrument held improperly admitted. *Farad Co. v. Buckalew*, 155 Miss. 194, 124 So. 333 (1929).

Admitting copy of administrator's bond in suit to enforce claim against estate after its approval held error, where copy of bond was not annexed to or filed with declaration. *Lawson v. Dean*, 144 Miss. 309, 109 So. 801 (1926), suggestion of error sustained, 144 Miss. 313, 110 So. 797 (1927).

ATTORNEY GENERAL OPINIONS

All cases, civil and criminal, shall be assigned by the clerk to justice court judges of county in manner provided in Miss. Code Section 11-9-105. *Ferguson*, June 9, 1993, A.G. Op. #93-0331.

Miss. Code Section 11-9-105 provides that it is duty of justice court clerk to record all civil suits and to assign them on rotating basis to justice court judges; this section also requires clerk to issue summons for particular defendant; it also requires clerk to record and assign and issue process on any civil case and thereafter "within two (2) working days, forward certified copies of documents pertaining to

the case to the justice court judge to which the case is assigned for further processing." *Ferguson*, June 9, 1993, A.G. Op. #93-0331.

Miss. Code Section 11-9-105 states that, in civil suits, justice court clerk shall record all filings. *Ferguson*, June 9, 1993, A.G. Op. #93-0331.

Miss. Code Section 11-9-105 requires justice court clerk to assign cases to judges on a rotation basis; however, as for setting docket, judges have discretion as to cases assigned; judges may establish procedure whereby clerk sets docket. *Ferguson*, June 9, 1993, A.G. Op. #93-0331.

RESEARCH REFERENCES

Am Jur. 47 *Am. Jur.* 2d, *Justices of the Peace* §§ 44-53.

15 *Am. Jur. Pl & Pr Forms (Rev)*, *Justices of the Peace*, Form 22 (*Summons*

compelling appearance before justice of the peace).

CJS. 51 *C.J.S.*, *Justices of the Peace* §§ 120-141.

§ 11-9-107. Service of process by sheriff or constable.

When any process has not been returned by a constable within ten (10) working days after issuance by the clerk of the justice court, the clerk shall direct the sheriff of his county and his deputies to execute any such process of the justice court; and the sheriff and his deputies shall execute any process so directed to him by any clerk of the justice court.

SOURCES: Codes, 1857, ch. 58, art. 11; 1871, § 1311; 1880, § 2198; 1892, § 2402; Laws, 1906, § 2731; *Hemingway's* 1917, § 2230; Laws, 1930, § 2079; Laws, 1942, § 1813; Laws, 1981, ch. 471, § 25; Laws, 1982, ch. 423, § 28; Laws, 1995, ch. 464, § 2, eff from and after October 1, 1995.

Cross References — Payment to county chancery clerk of fees collected for serving sprocess or writ issued in different county, see § 9-11-20.

Duties of constables, generally, see §§ 19-19-5, 19-19-7.

Duty of sheriff to execute and return process, see § 19-25-37.

Service of summons, see Rule 2.04, Uniform Rules of Procedure for Justice Court.

JUDICIAL DECISIONS

1. In general.

The record must affirmatively show that the person authorized to execute the summons executed it. *Postal Tel.-Cable Co. v. Thompson*, 121 Miss. 379, 83 So. 612 (1920).

A city marshal who is ex-officio constable may serve process within the city

limits and the presumption is in favor of its validity. *Gulf & S.I.R.R. v. Ramsey*, 98 Miss. 863, 54 So. 440 (1911).

Under the Constitution the jurisdiction of justices of the peace and the executive power of constables is limited to the districts for which they are elected. *Riley v. James*, 73 Miss. 1, 18 So. 930 (1895).

ATTORNEY GENERAL OPINIONS

The law requires a justice of the peace to issue his process and direct same to the constable of the district, if there be one duly qualified to act, unless the constable has some interest in the matter in litigation, and in that event the justice of the peace should endorse his reasons on the process for directing it to someone else. *Ops. Atty. Gen.*, 1931-33, p. 144.

This section safeguards against an impossibility on the part of a justice of the peace to obtain service of process, and a justice of the peace does not have authority to appoint a deputy constable for that purpose. *Ops. Atty. Gen.*, 1965-67, p. 122.

Section 11-9-107 directs the justice court clerk to issue process to a constable and if the process has not been returned to the clerk within ten working days, to issue that process to the sheriff's office to be served or executed. *McKee*, December 13, 1995, A.G. Op. #95-0825.

In the case where a criminal defendant has been found guilty and assessed a fine in justice court and has failed to make payment on the fine as agreed and a contempt warrant has been issued, under Section 11-9-107 all such process should

be issued to a constable. If the constable does not make a return within ten days, then the process should be issued to the sheriff for service. *Coleman*, January 26, 1996, A.G. Op. #96-0011.

Based on Section 11-9-107, a constable must accept all warrants issued to him from the justice court clerk and make a reasonable, good faith effort to serve them. However, if the warrant has not been returned to the clerk within ten working days after issuance to the constable, the clerk must send the warrant to the sheriff's office to be served by the sheriff or his deputies. The sheriff may not decline to accept such a warrant. *Lambert*, August 23, 1996, A.G. Op. #96-0577.

The duty of the clerk of the justice court to direct the sheriff of his county and his deputies to execute any process of the justice court that has not been returned by a constable within ten working days applies to civil process; a justice court is not required to issue criminal process, i.e., arrest warrants, to constables for a ten day period before directing such warrants to a sheriff's department. *Allgood*, January 23, 1998, A.G. Op. #98-0011.

RESEARCH REFERENCES

Am Jur. 47 Am. Jur. 2d, Justices of the Peace § 52.

62B Am. Jur. 2d, Process §§ 126, 131, 133.

15 Am. Jur. Pl & Pr Forms (Rev), Justices of the Peace, Form 23 (Summons

compelling appearance before justice of the peace-directed to sheriff).

CJS. 51 C.J.S., Justices of the Peace § 120.

72 C.J.S., Process § 35.

§ 11-9-109. Person appointed to execute process.

In cases of emergency, and where a constable or sheriff or deputy sheriff cannot be had in time, the clerk of the justice court may appoint some reputable person to execute any process, the clerk to be liable on his bond for all damage which may result to a party to the cause or other person from his appointment of an insolvent or incompetent person.

SOURCES: Codes, 1857, ch. 58, art. 11; 1871, § 1311; 1880, § 2199; 1892, § 2403; Laws, 1906, § 2732; Hemingway's 1917, § 2231; Laws, 1930, § 2080; Laws, 1942, § 1814; Laws, 1981, ch. 471, § 26; Laws, 1982, ch. 423, § 28, made eff from and after January 1, 1984, or, with respect to a given county, from and after such earlier date as the county appoints a justice court clerk pursuant to § 9-11-27(3).

Cross References — Service of summons, see Rule 2.04, Uniform Rules of Procedure for Justice Court.

JUDICIAL DECISIONS

1. In general.

In case of special emergency a justice of the peace is authorized to appoint a private person to execute any process which the justice of the peace is authorized to issue whether such writ is returnable to his court or some other court. *Gilbert v. Glenny*, 135 Miss. 603, 99 So. 507 (1924).

The appointment of a private person to serve a writ of attachment or garnishment in an emergency case is void where not in writing. *Brown v. Williams-Brooke Co.*,

106 Miss. 187, 63 So. 351 (1913).

The presumption of legality as to the authority of a person to serve a writ of summons prevails. *Alfred v. Batson*, 91 Miss. 749, 45 So. 465 (1908).

A justice cannot specially depute a private person to execute a writ of attachment in another county, even in a case of emergency. *Miller v. Edwards*, 75 Miss. 739, 23 So. 426 (1898); *Barnett v. Ring*, 55 Miss. 97 (1877); *Bates v. Crow*, 57 Miss. 676 (1880).

ATTORNEY GENERAL OPINIONS

Miss. Code Section 11-9-109, which states that "in cases of emergency, and where a constable or sheriff or deputy sheriff cannot be had in time, the clerk of the justice court may appoint some reputable person to execute any process", by its

own terms does not apply to papers served by deputy; in any case, there is no authority to pay individual appointed under this section to serve process. *Wilkerson*, Mar. 10, 1993, A.G. Op. #93-0120.

RESEARCH REFERENCES

Am Jur. 47 Am. Jur. 2d, Justices of the Peace § 52.

62B Am. Jur. 2d, Process §§ 126, 131, 133.

CJS. 72 C.J.S., Process §§ 36, 37.

§ 11-9-111. Property and process delivered to office.

Property seized in execution of any process by one appointed by the clerk of the justice court to execute it shall be immediately delivered, with the

process, to the sheriff of the county; and the person from whom the property was taken shall be at once informed who has it. Such property shall be considered and dealt with as if it had been seized by the officer to whom it was delivered at the time of its delivery to him.

SOURCES: Codes, 1880, § 2200; 1892, § 2404; Laws, 1906, § 2733; Hemingway's 1917, § 2232; Laws, 1930, § 2081; Laws, 1942, § 1815; Laws, 1981, ch. 471, § 27; Laws, 1982, ch. 423, § 28; Laws, 1991, ch. 324, § 1, eff from and after July 1, 1991.

Cross References — Levy on personal property, see § 13-3-125.

JUDICIAL DECISIONS

1. In general.

A return on a writ of replevin by a person appointed by a justice of the peace is void and the court has no jurisdiction unless the defendant appears, but upon his appearance and motion to quash the writ the court has jurisdiction of him. *Gilbert v. Glenn*, 135 Miss. 603, 99 So. 507 (1924).

Although one specially deputized to ex-

ecute process is required to deliver the same together with the property seized to the sheriff or constable, a claimant who gives bond and obtains from such person property levied upon by him, is estopped to take advantage of the irregularity. *Spears v. Robinson*, 71 Miss. 774, 15 So. 111 (1894); *State ex rel. Harland v. Depeder*, 65 Miss. 26, 3 So. 80 (1887).

§ 11-9-113. Process returned by sheriff or constable.

The process so delivered to the sheriff or constable shall be returned by him to the clerk of the justice court, according to its command.

SOURCES: Codes, 1880, § 2201; 1892, § 2405; Laws, 1906, § 2734; Hemingway's 1917, § 2233; Laws, 1930, § 2082; Laws, 1942, § 1816; Laws, 1981, ch. 471, § 28; Laws, 1982, ch. 423, § 15, eff from and after January 1, 1984, or, with respect to a given county, from and after such earlier date as the county appoints a justice court clerk pursuant to § 9-11-27(3).

Editor's Note — See Editor's Note to § 11-9-101 for provisions governing effective dates of 1981 and 1982 amendments affecting justice courts and justice court judges.

Cross References — Payment to county chancery clerk of fees collected for serving process or writ issued in different county, see § 9-11-20.

Return of writ of attachment by sheriff when writ is served by one other than sheriff, see § 11-33-27.

Marking and return of process by sheriff, see § 13-3-37.

ATTORNEY GENERAL OPINIONS

It is the responsibility of the constable who served the summons to verify his service by making a return of such process as specified by the statute; the constable

should sign the return verifying that such process was served by him. *Hemphill*, December 18, 1998, A.G. Op. #98-0746.

RESEARCH REFERENCES

Am Jur. 47 Am. Jur. 2d, Justices of the Peace § 53.
62B Am. Jur. 2d, Process §§ 317 et seq.

CJS. 51 C.J.S., Justices of the Peace §§ 133-135.
72 C.J.S., Process §§ 77 et seq.

§ 11-9-115. Witnesses to be subpoenaed.

The justice court judge before whom any cause is pending shall direct the clerk of the justice court to issue all subpoenas for witnesses which either of the parties may require, and such subpoenas shall be returnable on a day certain, giving reasonable time for attendance. If any witness, duly subpoenaed, shall fail to appear in pursuance of the subpoena, he shall forfeit the sum of ten dollars (\$10,00), for the use of the party in whose behalf he was subpoenaed, for which the justice court judge may enter judgment nisi, which shall be made final in case the witness, on being duly subpoenaed to appear and show cause, shall fail to appear and show cause for such default. The justice court may issue an attachment for such witness, as a circuit court may do in like case.

SOURCES: Codes, Hutchinson's 1848, ch. 50, art. 2 (13); 1857, ch. 58, art. 16; 1871, § 1313; 1880, § 2202; 1892, § 2406; Laws, 1906, § 2735; Hemingway's 1917, § 2234; Laws, 1930, § 2083; Laws, 1942, § 1817; Laws, 1981, ch. 471, § 29; Laws, 1982, ch. 423, § 28, made eff from and after January 1, 1984, or, with respect to a given county, from and after such earlier date as the county appoints a justice court clerk pursuant to § 9-11-27(3).

Cross References — Subpoenas for witnesses in civil cases generally, see §§ 13-3-93 et seq.

Subpoenas for witnesses in criminal cases, see §§ 99-9-11 et seq.

Failure to obey subpoena, see Rule 1.14, Uniform Rules of Procedure for Justice Court.

ATTORNEY GENERAL OPINIONS

Miss. Code Section 11-9-115 provides that justice court judge shall direct justice court clerk to issue all subpoenas for wit-

nesses which either party may require. Ferguson, June 9, 1993, A.G. Op. #93-0331.

RESEARCH REFERENCES

Am Jur. 81 Am. Jur. 2d, Witnesses §§ 7 et seq.

CJS. 98 C.J.S., Witnesses §§ 20 et seq.

§ 11-9-117. Form of entry on default of witness.

The judgment nisi against a defaulting witness, may be in the following form, viz.:

"_____, being subpoenaed to appear this day as a witness for _____, the _____, in the case of _____ v. _____, No. _____, and having made default, judgment is given against said _____, the defaulting witness,

for ten dollars, in favor of _____, to be made final unless said _____, the witness, shall show cause against it according to law.”

SOURCES: Codes, 1871, § 1313; 1880, § 2248; 1892, § 2407; Laws, 1906, § 2736; Hemingway’s 1917, § 2235; Laws, 1930, § 2084; Laws, 1942, § 1818.

§ 11-9-119. Form of scire facias for witness.

The scire facias to be issued by the justice for a defaulting witness may be as follows, viz.:

“The State of Mississippi.

“To any lawful officer of _____ County:

“This is to command you to make known to _____ that a judgment in favor of _____ for ten dollars has been given against him by me, a justice of the peace of _____ County, for his default in not appearing before me, at _____, on the _____ day of _____ A. D. _____, to testify as a witness for _____ in the case of _____ against _____, No. _____ as he has been subpoenaed to do; and unless, on the _____ day of _____, A. D. _____, before me at _____, at _____, o’clock, _____, he shall show cause to the contrary, the said judgment will be made final; and have there then this writ.

“Witness my hand this the _____ day of _____, A. D. _____ J.P.”

SOURCES: Codes, 1880, § 2249; 1892, § 2408; Laws, 1906, § 2737; Hemingway’s 1917, § 2236; Laws, 1930, § 2085; Laws, 1942, § 1819.

Editor’s Note — Pursuant to Miss. Const. Art. 6, § 171, all references in the Mississippi Code to justice of the peace shall mean justice court judge.

§ 11-9-121. Form of an attachment for a witness.

An attachment for a witness may be in the following form, viz.:

“The State of Mississippi.

“To any lawful officer of _____ County:

“We command you to take the body of _____, and have him before the undersigned justice of the peace of _____ County, at _____, on the _____ day of _____, A. D. _____ at _____ o’clock _____, to testify for the _____ in the case of _____ against _____, No. _____. (But if the said _____ shall furnish bail, with sureties, to be approved by you, in the sum of one hundred dollars, for his appearance at said time and place, you will discharge him.) And have there then this writ.

“Witness my hand, the _____ day of _____, A. D. _____”

The part in brackets should be omitted, if it be not intended that the witness shall be discharged on bail, but shall be brought before the court by the officer. An attachment and scire facias for a defaulting witness may be combined in one writ, and when the witness is before the justice of the peace in pursuance of such process, the judgment nisi shall be made final, if good cause to the contrary be not shown.

SOURCES: Codes, 1880, §§ 2250, 2251; 1892, § 2409; Laws, 1906, § 2738; Hemingway's 1917, § 2237; Laws, 1930, § 2086; Laws, 1942, § 1820.

Editor's Note — Pursuant to Miss. Const. Art. 6, § 171, all references in the Mississippi Code to justice of the peace shall mean justice court judge.

Cross References — Subpoenas for witnesses in civil cases generally, see §§ 13-3-93 et seq.

Attachment for subpoenaed witnesses who fail to appear in civil case, see § 13-3-103.

Subpoenas of witnesses in criminal cases, see §§ 99-9-11 et seq.

Attachment of witnesses failing to appear in criminal case, see § 99-9-19.

§ 11-9-123. Form of entry of judgment in such case.

The entry of final judgment in such case may be in the following form, viz.:

“_____ being duly summoned to appear and show cause against the judgment nisi for ten dollars entered against him in favor of _____, as a defaulting witness in the case of _____ v. _____ No. _____ on the _____ day of _____ A. D. _____, and having failed to show cause for such default, the said judgment nisi for ten dollars is now made final, as well as judgment for costs in said matter, this the _____ day of _____ A. D. _____.”

SOURCES: Codes, 1880, § 2252; 1892, § 2410; Laws, 1906, § 2739; Hemingway's 1917, § 2238; Laws, 1930, § 2087; Laws, 1942, § 1821.

§ 11-9-125. Setoff filed on return day before trial.

The defendant in any action shall, on or before the return day of the summons, and before the trial of the case, file with the justice court judge to whom the case is assigned the evidence of debt, statement of account, or other written statement of the claim, if any, which he may desire to and which lawfully may be set off against the demand of the plaintiff, and, in default thereof, he shall not be permitted to use it on the trial.

SOURCES: Codes, 1871, § 1306; 1880, § 2204; 1892, § 2411; Laws, 1906, § 2740; Hemingway's 1917, § 2239; Laws, 1930, § 2088; Laws, 1942, § 1822; Laws, 1981, ch. 471, § 30; Laws, 1982, ch. 423, § 28, made eff from and after January 1, 1984, or, with respect to a given county, from and after such earlier date as the county appoints a justice court clerk pursuant to § 9-11-27(3).

Editor's Note — See Editor's Note to § 11-9-101 for provisions governing effective dates of 1981 amendments affecting justice courts and justice court judges.

Cross References — Money paid into the justice court clerk clearing account, see § 9-11-18.

JUDICIAL DECISIONS

1. In general.
2. Availability of set-off.
3. —Mutuality.
4. —Jurisdictional amount.
5. —Assignments.
6. Time for filing.
7. Matters which may be set off.
8. Recoupment.

9. Pleading.
10. Evidence.

1. In general.

Where defendant filed no plea of setoff in action against him for rent in justice court, objection to his testimony as to work performed for plaintiff was properly sustained. *Wright v. Thornton*, 196 Miss. 395, 17 So. 2d 437 (1944).

Where on appeal to the circuit court, defendant interposed plea of setoff and introduced evidence in support thereof without objection of plaintiff until motion for new trial was filed, plaintiff was presumed to have consented, or at least to have waived its objection, to the filing of the plea out of time. *Wright v. Thornton*, 196 Miss. 395, 17 So. 2d 437 (1944).

The court is liberal in its allowance of counterclaims in cases of insolvency in order that only the true balance may be paid. *Citizens' Bank v. Kretschmar*, 91 Miss. 608, 44 So. 930 (1907).

2. Availability of set-off.

A claim acquired after institution of replevin suit cannot be availed of in the suit. *McIntyre v. E.E. Forbes Piano Co.*, 100 Miss. 517, 56 So. 457 (1911).

Setoff is not available in a suit for unliquidated damages. *Burrus v. Gordon*, 57 Miss. 93 (1879).

The statute does not authorize a setoff against the state. *Raymond v. State*, 54 Miss. 562, 28 Am. R. 382 (1877).

3. —Mutuality.

Debts cannot be shown to be mutual by evidence that one or more of the debtors are mere sureties. *Peine v. Lewis*, 64 Miss. 96, 8 So. 207 (1886).

A setoff is in the nature of a cross action, and in a joint action by several plaintiffs their separate debts to the defendant cannot be set off against their joint demand. *Walter Denney & Co. v. Wm. D. Wheelwright & Co.*, 60 Miss. 733 (1883).

A demand against one person cannot be set off against him and his nominal partner in a suit by them on a note made to the firm. A setoff must be against all the plaintiffs. *Jones v. Howard*, 53 Miss. 707 (1876).

If the action be by more than one plaintiff, and it is proposed to set off a debt of

one plaintiff to the defendant; or if the action be against more than one defendant, and the proposed setoff be in favor of but one of them, there will be a want of mutuality; but if the setoff be in favor of all of the defendants and against all the plaintiffs and another person, and the debt be the several debt of each, it will be good. That another party also owes the debt does not destroy its several character or destroy mutuality. *Moody v. Willis*, 41 Miss. 347 (1867); *Peyton v. Planters' Compress Co.*, 63 Miss. 410 (1886).

4. —Jurisdictional amount.

The defendant may prove a setoff greater in amount than the jurisdiction of the justice, if the balance, after deducting the amount of the plaintiff's demand, does not exceed his jurisdiction. *Glass v. Moss*, 2 Miss. (1 Howard) 519 (1837).

5. —Assignments.

Defendant, after assignee of account was substituted as plaintiff, was not entitled to recover over against him on counterclaim. *Graham v. Stewart*, 152 Miss. 307, 120 So. 171 (1929).

Assignee of account could not, after defendant in action thereon filed setoff, be substituted as plaintiff over objection. *Graham v. Stewart*, 152 Miss. 307, 120 So. 171 (1929).

An instance in an anti-commercial statute where a railroad company which purchased lumber from a party indebted to it for freight advances may set off its claim after seller's bankruptcy against the bank as assignee of the invoices. *Illinois Cent. R.R. v. First Nat'l Bank*, 110 Miss. 676, 70 So. 831 (1916).

An open account transferred by delivery may be so used. *Ashby v. Carr*, 40 Miss. 64 (1866).

A setoff cannot be interposed by the maker of a note which has been assigned unless the setoff existed at the time of the notice of the assignment. *Northern Bank v. Kyle*, 8 Miss. (7 Howard) 360 (1843).

It is not necessary that an assignment should appear on a transferred note to enable the holder to use it as a setoff. *Glass v. Moss*, 2 Miss. (1 Howard) 519 (1837).

6. Time for filing.

In suit on itemized account, defendant's denial of correctness of specific charge and

credit items held counter-affidavit, not setoff; hence could be first filed in circuit court on appeal from justice's court, see *McClain v. Henson*, 169 Miss. 857, 153 So. 791 (1934).

A defense and cross action of setoff in a suit before a justice of the peace must be filed on or before return day of summons and before trial. *Richardson Corp. v. Standard Drug Co.*, 141 Miss. 92, 106 So. 95 (1925).

7. Matters which may be set off.

An instance in which one bank may have its claim set off against another, see *Citizens' Bank v. Kretschmar*, 91 Miss. 608, 44 So. 930 (1907).

In an action for the price of a carload of meal, defendant may assert as a setoff a claim he has against plaintiff because of inferior quality in corn and oats formerly purchased from plaintiff and paid for. *Wilkinson v. Searls*, 70 Miss. 392, 13 So. 470 (1892); *Miller v. American Nat'l Bank*, 76 Miss. 84, 23 So. 439 (1898).

A bank may apply the amount to the credit of a depositor to a debt due to it by him jointly with another. *Eyrich v. Capital State Bank*, 67 Miss. 60, 6 So. 615 (1889).

In an action by a clerk against a storekeeper for the value of his services, the employer cannot set off a demand for money lost from the cash-drawer owing to the clerk's negligence. *Cobb v. Wilson, Lees & Co.*, 60 Miss. 343 (1882).

In an action of assumpsit, the defendant, having a claim as beneficiary under a deed of trust for the value of property converted and sold by the plaintiff, may set off the same against the plaintiff's demand. *Hunt & Vaughan v. Shackleford*, 55 Miss. 94 (1877).

An unliquidated claim for damages cannot be used as a setoff. *Casper v. Thigpen*, 48 Miss. 635 (1873).

8. Recoupment.

This section [Code 1942, § 1822] does not apply to the interposition of a claim in recoupment. *Criss v. Bailey*, 243 Miss. 130, 137 So. 2d 160 (1962).

Recoupment is purely defensive and no judgment for an amount over can be recovered in favor of defendant. *Hoover Com. Co. v. Humphrey*, 107 Miss. 810, 66 So. 214 (1914).

If plaintiff's claim for damages is denied the plea of recoupment therein cannot be allowed. *Hoover Com. Co. v. Humphrey*, 107 Miss. 810, 66 So. 214 (1914).

This section [Code 1942, § 1822] has no application to a claim interposed in recoupment. Recoupment may be interposed for the first time on appeal to the circuit court. *Amory Indep. Tel. Co. v. Cox*, 103 Miss. 541, 60 So. 641 (1913).

Distinguishing "recoupment" from "set-off." *Hayes v. Slidell Liquor Co.*, 99 Miss. 583, 55 So. 356 (1911).

A suit brought for the purchase-money of machinery and a plea of setoff for unliquidated damages is filed and on such plea only matters in recoupment are considered, thus treating the plea as one in recoupment is not reversible error. *W.T. Adams Mach. Co. v. Thomas*, 87 Miss. 391, 39 So. 810 (1906).

In a suit by a grantor for the purchase-money of land conveyed by general warranty, the grantee may recoup damages sustained by reason of expenses incurred by him in getting possession of the land, but is not entitled to credit for the costs of store fixtures purchased by him from the occupant to induce a surrender of the premises. *Weatherbee Bros. v. Lillybeck*, 86 Miss. 156, 38 So. 284 (1905).

Recoupment is contradistinguished from setoff in three essential particulars: (1) It being confined to matters arising out of and connected with the transaction or contract upon which the suit is brought; (2) in having no regard to whether or not such matter be liquidated or unliquidated; (3) that the judgment is not regulated by statute. *Myers v. Estell*, 47 Miss. 4 (1872).

9. Pleading.

Written pleadings in a justice of peace court are not mandatory except where setoff is involved in the defense. *National Hardwood Lumber Ass'n v. Gilmore Puckett Lumber Co.*, 210 Miss. 354, 49 So. 2d 689 (1951).

In a suit by a county a plea of setoff is bad which does not show that the claim sought to be set off has been presented to the board of supervisors and rejected. *Board of Supvrs. v. Brookhaven*, 51 Miss. 68 (1875); *State ex rel. Noxubee County v. Banks*, 66 Miss. 431, 6 So. 184 (1889).

Under a plea of payment a bill of particulars is necessary to enable defendant to avail himself of a setoff. *Vanzant v. Shelton*, 40 Miss. 332 (1866).

10. Evidence.

Testimony of defendant in action in justice court against him for rent of apartment, that plaintiff was indebted to him for work performed was properly rejected in the absence of compliance with the

requirements of this section [Code 1942, § 1822]. *Wright v. Thornton*, 196 Miss. 395, 17 So. 2d 437 (1944).

If defendant pleads as a setoff and testifies to a contract and services thereunder, plaintiff may state in evidence his version of the contract, even though he makes out a contract under the statute of frauds. *Timberlake v. Thayer*, 76 Miss. 76, 23 So. 767 (1898).

RESEARCH REFERENCES

Am Jur. 20 Am. Jur. 2d, Counterclaim, Recoupment, and Setoff §§ 98, 104.

15 Am. Jur. Pl & Pr Forms (Rev), Justices of the Peace, Forms 31-33 (Filing of

evidence for set off judgments).

CJS. 80 C.J.S., Setoff and Counterclaim §§ 102, 103.

§ 11-9-127. Trial and judgment; execution.

On the return day of the summons, unless continued, the justice court judge shall hear and determine the cause if both parties appear; give judgment by default if the defendant fails to appear and contest plaintiff's demand, or judgment of nonsuit against the plaintiff if he fails to appear and prosecute his claim; enter judgment in favor of the defendant where, in case of setoff, it shall appear that there is a balance due him, for the amount of such balance, and, when requested, issue execution against the goods and chattels, lands and tenements, of the party against whom judgment is rendered, for the amount of the judgment and costs, or costs alone, as the case may require, returnable to a day more than twenty (20) days after the rendition of the judgment, and not more than six (6) months after the issuance of the execution; and the execution may be directed to the proper officer of any county in this state.

SOURCES: Codes, *Hutchinson's* 1848, ch. 50, art. 2 (9); 1857, ch. 58, art. 7; 1871, § 1307; 1880, § 2205; 1892, § 2412; Laws, 1906, § 2741; *Hemingway's* 1917, § 2240; Laws, 1930, § 2089; Laws, 1942, § 1823; Laws, 1991, ch. 453, § 1, eff from and after July 1, 1991.

Cross References — Money paid into the justice court clerk clearing account, see § 9-11-18.

Taxation of costs in cases from justices of the peace, see § 11-53-71.

Arrangement of dates of court by justices and county prosecuting attorneys, see § 19-23-17.

JUDICIAL DECISIONS

1. In general.
2. Judgments.
3. Executions.

1. In general.

Debtors did not deny that they were all properly served with process and all failed

to appear and defend the collection action, and pursuant to statutory law, the justice court was not in error in entering a default judgment, which included reasonable attorney fees, on the collection agency's collection actions against the debtors for unpaid medical bills. *Franklin Collection Serv. v. Stewart*, 863 So. 2d 925 (Miss. 2003).

Defendant, after assignee of account was substituted as plaintiff, was not entitled to recover over against him on counterclaim. *Graham v. Stewart*, 152 Miss. 307, 120 So. 171 (1929).

A justice of the peace has no right to grant a new trial. An appeal from judgment by default must be perfected within ten days. *Welch v. Hannie*, 112 Miss. 79, 72 So. 861, Am. Ann. Cas. 1918C,325 (1916).

Exclusion in the circuit court, on trial of claimant's issue, of the testimony of a justice of the peace, by whom judgment was rendered and execution issued on certain property, as to statements made by the defendant in execution and by the claimant was erroneous. *Dalee Bros. v. Wigginton*, 111 Miss. 749, 72 So. 149 (1916).

2. Judgments.

A judgment rendered in the absence of defendant and of his counsel should be set aside where such absence was caused by their reliance on a statement made officially by the judge of the court that the case could not be reached, or would not be tried, before a certain date. *Gardner v. Price*, 199 Miss. 809, 25 So. 2d 459, 164 A.L.R. 532 (1946).

Default judgment entered by justice of the peace on March 11, 1939, in violation of justice's assurance to defendants' counsel that the case would not be set for trial until March 25, 1939, which was after the adjournment of circuit court term, in accordance with custom existing among attorneys and magistrates in the county to continue cases coming up during circuit court's term until after adjournment thereof, was void. *Gardner v. Price*, 199 Miss. 809, 25 So. 2d 459, 164 A.L.R. 532 (1946).

Judgment in justice court, reciting that defendant entered general appearance but declined to introduce evidence, sufficiently showed that issue was joined. *Mississippi Cent. R.R. v. May*, 149 Miss. 334, 115 So. 561 (1928).

A justice of the peace judgment on merits against plaintiff, though it should have been a judgment or nonsuit for failure to prosecute, held only erroneous, and not void and is available as *res judicata*. *Childress v. Thomas Dry Goods Co.*, 145 Miss. 429, 110 So. 861 (1927).

As to validity of judgment by default, see *Welch v. Hannie*, 112 Miss. 79, 72 So. 861, Am. Ann. Cas. 1918C,325 (1916).

A judgment of a justice of the peace for plaintiff trying a case without a jury is a finding of plaintiff's right to recover and of his damages. *Pharr Bros. & Jennings v. Yazoo & Miss. V.R. Co.*, 111 Miss. 830, 72 So. 240 (1916).

Where a justice of the peace entered judgment for a sum greater than the amount of the judgment rendered and the defeated party took no steps against said error by appeal or proper motion at law he is not entitled to restrain collection thereof by an injunction. *Gum Carbo Co. v. New Orleans German Gazette*, 90 Miss. 177, 43 So. 82 (1907).

For an example of a judgment of a justice of the peace questioned and held sufficient, see *Swain v. Gilder*, 61 Miss. 667 (1884).

3. Executions.

Since execution is required to be returned to the justice of the peace rendering judgment, a justice of the peace cannot be a purchaser at the execution sale under his own judgment. *E.E. Forbes Piano Co. v. Hennington*, 98 Miss. 51, 53 So. 777, Am. Ann. Cas. 1913A,1216 (1910).

An execution issued to the sheriff of another county by the clerk of the circuit court on a duly enrolled judgment of a justice of his county, returnable before such justice, is void as also the seizure of defendant's property thereunder. *Smith v. Mixon*, 73 Miss. 581, 19 So. 295 (1896).

ATTORNEY GENERAL OPINIONS

It is not necessary under Miss. Code Section 11-9-127 for justice court judgment to be enrolled on circuit clerk's judgment roll in order to effectuate garnishment or execution. Riggs, Feb. 18, 1993, A.G. Op. #93-0081.

Miss. Code Section 11-9-127 sets out duties of justice court judge as to court dates. Ferguson, June 9, 1993, A.G. Op. #93-0331.

Under Sections 11-9-127 and 13-3-133, to enforce the final judgment of the court is it legal to specify money on defendant's person and/or money in cash drawer of a business on the same execution. However, the sheriff may not conduct a search of a person or premises without a warrant from a court, but may seize any property that is in plain view. Aldridge, May 2, 1995, A.G. Op. #95-0156.

RESEARCH REFERENCES

Am Jur. 47 Am. Jur. 2d, Justices of the Peace §§ 57 et seq.

15 Am. Jur. Pl & Pr Forms (Rev), Justices of the Peace, Forms 43-50 (Writ of execution).

CJS. 51 C.J.S., Justices of the Peace §§ 196 et seq.

§ 11-9-129. Judgment operates as a lien if enrolled.

Judgments rendered by justices of the peace shall operate as a lien upon the property, real or personal, of the defendant or defendants therein, found or situated in the county where rendered, or in any other county where the same may be, which is not exempt by law from execution, if an abstract of the judgment be filed with the clerk of the circuit court of the county wherein the property is situated, and entered upon the judgment roll, as in other cases of enrolled judgments. The lien shall commence from the date of enrollment, and the judgment may be enrolled and have the force and effect of a lien in all cases where an appeal is taken, as well as in other cases. And in the event of a reversal of the judgment of the justice's court, the clerk of the circuit court shall enter a memorandum to that effect on the judgment roll.

SOURCES: Codes, Hutchinson's 1848, ch. 50, art. 10 (13); 1857, ch. 58, art. 20; 1871, § 1318; 1880, § 2206; 1892, § 2413; Laws, 1906, § 2742; Hemingway's 1917, § 2241; Laws, 1930, § 2090; Laws, 1942, § 1824.

Editor's Note — Pursuant to Miss. Const. Art. 6, § 171, all references in the Mississippi Code to justice of the peace shall mean justice court judge.

Cross References — Where sales under execution of justice's court may be made, see § 13-3-161.

JUDICIAL DECISIONS

1. In general.

Judgment rendered by a justice of the peace may be enrolled in the office of the clerk of the circuit court before the expiration of the five days allowed for the

appeal. *Minshaw v. Geo. W. Davidson & Co.*, 86 Miss. 354, 38 So. 315 (1905).

Judgments rendered by justices of the peace may be enrolled in any county in the state on filing an abstract of the judgment

with the clerk of the circuit court. *Wise v. Keer Thread Co.*, 84 Miss. 200, 36 So. 244 (1904).

A judgment of a justice of the peace may be enrolled in any county upon compliance with this section [Code 1942, § 1824]. *Wise v. Keer Thread Co.*, 84 Miss. 200, 36 So. 244 (1904).

The plaintiff may have his judgment

enrolled in the manner specified in any other county where property of the debtor may be situated, and have execution issued by the clerk of the circuit court of such county to an officer of that county, returnable into the justice's court by which the judgment is rendered. *Smith v. Mixon*, 73 Miss. 581, 19 So. 295 (1896).

ATTORNEY GENERAL OPINIONS

Miss. Code Section 11-9-129 provides that judgment becomes lien against judgment debtor's property in county, if and

when enrolled in circuit clerk's office. *Riggs*, Feb. 18, 1993, A.G. Op. #93-0081.

RESEARCH REFERENCES

ALR. Necessity of notice of application or intention to correct error in judgment entry. 14 A.L.R.2d 224.

Am Jur. 15 Am. Jur. Pl & Pr Forms (Rev), Justices of the Peace, Form 41 (Af-

fidavit of amount due-for judgment to act as lien on defendant's real estate).

CJS. 51 C.J.S., Justices of the Peace § 263.

§ 11-9-131. Execution not to be issued within ten days.

An execution shall not issue on any judgment of a justice of the peace until ten days after its rendition, unless the party recovering therein shall make and file an affidavit that he believes he will be in danger of losing his debt or demand by such delay, in which case execution shall issue immediately; but the opposite party shall not be deprived of his right of appeal within the time prescribed.

SOURCES: Codes, *Hutchinson's* 1848, ch. 50, art. 2 (17); 1857, ch. 58, art. 21; 1871, § 1317; 1880, § 2207; 1892, § 2414; Laws, 1906, § 2743; *Hemingway's* 1917, § 2242; Laws, 1930, § 2091; Laws, 1942, § 1825.

Editor's Note — Pursuant to Miss. Const. Art. 6, § 171, all references in the Mississippi Code to justice of the peace shall mean justice court judge.

Cross References — Executions in general, see §§ 13-3-113 et seq.

What is necessary to complete title to land sold under execution issued by justice of the peace, see § 13-3-189.

RESEARCH REFERENCES

Am Jur. 47 Am. Jur. 2d, Justices of the Peace § 75.

CJS. 51 C.J.S., Justices of the Peace § 275.

§ 11-9-133. Form of an execution.

An execution may be in the following form, viz.:

"The State of Mississippi.

"To any lawful officer of _____ county:

"We command you that of the real and personal estate of _____ you cause to be made _____ dollars, adjudged by the undersigned, justice of the peace of the county of _____ in said state, on the _____ day of _____ A. D. _____, to _____, also interest at _____ per centum on said sum until you shall make said money, and costs to amount of _____ dollars, as taxed, and costs to accrue under this execution, to be taxed by you; and have said money before me on the _____ day of _____, A. D. _____, and have there then this writ.

"Witness my hand the _____ day of _____ A. D. _____ J. P."

Detailed statement of costs, giving each item separately and specifying the law for it, the section and paragraph thereof, viz.; "Issuing summons, \$_____, serving summons \$_____, " etc.

SOURCES: Codes, 1880, § 2253; 1892, § 2415; Laws, 1906, § 2744; Hemingway's 1917, § 2243; Laws, 1930, § 2092; Laws, 1942, § 1826.

Editor's Note — Pursuant to Miss. Const. Art. 6, § 171, all references in the Mississippi Code to justice of the peace shall mean justice court judge.

RESEARCH REFERENCES

Am Jur. 47 Am. Jur. 2d, Justices of the Peace § 75. **CJS.** 51 C.J.S., Justices of the Peace § 276.

§ 11-9-135. Proceedings in replevin, attachment, liens.

Proceedings in replevin, attachment, trial of a claim to property levied on, and for the enforcement of statutory liens before justices of the peace, shall be, as far as practicable, according to those in the circuit courts, in all like cases.

SOURCES: Codes, 1871, § 1321; 1880, § 2212; 1892, § 2416; Laws, 1906, § 2745; Hemingway's 1917, § 2244; Laws, 1930, § 2093; Laws, 1942, § 1827.

Editor's Note — Pursuant to Miss. Const. Art. 6, § 171, all references in the Mississippi Code to justice of the peace shall mean justice court judge.

Cross References — Claim by person not a party to the action of property levied upon, see §§ 11-23-7 et seq.

Remedy of attachment generally, see §§ 11-33-1 et seq.

Proceedings before justices of the peace in cases of attachment, see §§ 11-33-105, 11-33-107.

Enforcement of liens generally, see §§ 85-7-31 et seq.

JUDICIAL DECISIONS

1. In general.

On a writ of certiorari from a justice court the proper judgment should be either one of affirmance or reversal, and if the latter a proper judgment should be entered. *Williams v. Williams*, 117 Miss. 251, 78 So. 152 (1918).

In a replevin suit the plaintiff cannot be allowed to recover judgment for a greater value than that alleged in the affidavit. *Brown v. Williams-Brooke Co.*, 106 Miss. 187, 63 So. 351 (1913).

The affidavit in replevin determines the jurisdiction of the court so far as it con-

cerns the value of the property sued for, unless the plaintiff knowingly undervalued or overvalued it for jurisdictional purposes. *Ball, Brown & Co. v. Sledge*, 82 Miss. 749', 35 So. 447, 100 Am. St. R. 654 (1903).

§ 11-9-137. Judgment on merits *res adjudicata*.

When any suit brought before a justice of the peace shall be finally decided on its merits by the justice, it shall be a bar to a recovery for the same cause of action or setoff in any other suit.

SOURCES: Codes, Hutchinson's 1848, ch. 50, art. 2 (15); 1857, ch. 58, art. 19; 1871, § 1316; 1880, § 2213; 1892, § 2417; Laws, 1906, § 2746; Hemingway's 1917, § 2245; Laws, 1930, § 2094; Laws, 1942, § 1828.

Editor's Note — Pursuant to Miss. Const. Art. 6, § 171, all references in the Mississippi Code to justice of the peace shall mean justice court judge.

JUDICIAL DECISIONS

1. In general.

Justice's judgment on merits against plaintiff, though it should have been of nonsuit for failure to prosecute, held only erroneous, and available as *res judicata*. *Childress v. Thomas Dry Goods Co.*, 145

Miss. 429, 110 So. 861 (1927).

The testimony of the justice of the peace is incompetent to vary the effect of his decision as to the matter of *res judicata*. *Munn v. S.F. Bowser & Co.*, 114 Miss. 500, 75 So. 372 (1917).

RESEARCH REFERENCES

ALR. *Res judicata* as affected by fact that former judgment was entered by agreement or consent. 2 A.L.R.2d 514.

Am Jur. 47 Am. Jur. 2d, *Justices of the Peace* § 70.

CJS. 51 C.J.S., *Justices of the Peace* §§ 258-262.

§ 11-9-139. Execution of judgment may be stayed.

If the party against whom judgment is given, shall, within ten days thereafter, procure some responsible person to appear before the justice, and in writing, to be entered on the docket of the justice and signed by such person, consent to become surety therefor, the justice shall grant a stay of execution for thirty days from the date of the judgment on all sums not exceeding fifty dollars and for sixty days on all sums over fifty dollars. In case the money be not paid at the expiration of such stay, execution shall issue against the principal and sureties, or either of them, for the principal, interest, and costs.

SOURCES: Codes, Hutchinson's 1848, ch. 50, art. 2 (16); 1857, ch. 58, art. 22; 1871, § 1343; 1880, § 2214; 1892, § 2418; Laws, 1906, § 2747; Hemingway's 1917, § 2246; Laws, 1930, § 2095; Laws, 1942, § 1829.

Editor's Note — Pursuant to Miss. Const. Art. 6, § 171, all references in the Mississippi Code to justice of the peace shall mean justice court judge.

RESEARCH REFERENCES

Am Jur. 47 Am. Jur. 2d, Justices of the Peace § 67.

15 Am. Jur. Pl & Pr Forms (Rev), Justices of the Peace, Form 42 (Affidavit of

amount due for stay of execution).

CJS. 51 C.J.S., Justices of the Peace § 281.

§ 11-9-141. Effect of stay.

A party obtaining a stay of execution shall thereby waive all errors in the judgment and abandon the right of appeal and certiorari.

SOURCES: Codes, 1871, § 1344; 1880, § 2215; 1892, § 2419; Laws, 1906, § 2748; Hemingway's 1917, § 2247; Laws, 1930, § 2096; Laws, 1942, § 1830.

RESEARCH REFERENCES

CJS. 51 C.J.S., Justices of the Peace § 281.

§ 11-9-143. Trial by jury.

On or before the return day of the process either party may demand a trial by jury, and thereupon the justice of the peace shall order the proper officer to summon six persons, competent to serve as jurors in the circuit court, to appear immediately, or at such early day as he may appoint, whether at a regular term or not, who shall be sworn to try the case; but each party shall be entitled to challenge peremptorily two jurors, and as many more as he can show sufficient cause for. If a sufficient number of jurors shall not appear, others may be summoned until a jury is made up, to consist of six, against whom legal objections shall not exist. If the jury fail to agree, it may be discharged and another jury summoned, and so on until a verdict is obtained, and judgment shall be entered by the justice on the verdict.

SOURCES: Codes, Hutchinson's 1848, ch. 50, art. 10 (5); 1857, ch. 58, art. 26; 1871, § 1326; 1880, § 2222; 1892, § 2425; Laws, 1906, § 2754; Hemingway's 1917, §§ 2253; Laws, 1930, § 2102; Laws, 1942, § 1836.

Editor's Note — Pursuant to Miss. Const. Art. 6, § 171, all references in the Mississippi Code to justice of the peace shall mean justice court judge.

Cross References — Selection of petit jury, generally, see §§ 13-5-65 et seq.

JUDICIAL DECISIONS

1. In general.

In civil jury trial in Federal District Court, equal protection component of Fifth Amendment due process clause prohibits private litigant from using peremptory challenge to exclude prospective jurors on account of race because such race-based exclusion violates equal protection rights of excluded jurors; opposing litigant

has third-party standing to raise excluded jurors' rights in opposing litigant's own behalf; and, while role of litigants in determining jury's composition may provide one reason for wide acceptance of jury system and its verdicts, if race stereotypes are price for acceptance of jury panel, price is too high to meet standard of constitution. *Edmonson v. Leesville Con-*

crete Co., 500 U.S. 614, 111 S. Ct. 2077, 114 L. Ed. 2d 660 (1991), on remand, 943

F.2d 551 (5th Cir. La. 1991), reh'g denied, (5th Cir. Oct. 21, 1991).

ATTORNEY GENERAL OPINIONS

A justice of peace does not have authority to designate individuals to perform jury duty in the justice of peace court.

Ops. Atty. Gen. (Opinion dated October 30, 1969, added to 1972 Code section 11-9-143).

RESEARCH REFERENCES

ALR. Small claims: jury trial rights in, and on appeal from, small claims court proceeding. 70 A.L.R.4th 1119.

Prospective juror's connection with insurance company as ground for challenge for cause. 9 A.L.R.5th 102.

Use of peremptory challenges to exclude Caucasian persons, as a racial group, from

criminal jury—post-Batson state cases. 47 A.L.R.5th 259.

Am Jur. 47 Am. Jur. 2d, Jury §§ 128 et seq.

15 Am. Jur. Pl & Pr Forms (Rev), Jury, Form 1.1 (Demand for jury trial — Indorsed on pleadings).

CJS. 50 C.J.S., Juries §§ 201-204.

§ 11-9-145. Multiple cases tried by same jury.

If a justice have more jury cases than one on the same day, he shall use the same jury for the trial of each, subject to the right of challenge by either party and like proceedings in all respects as in other cases. If more cases than one be tried by the same jury, the justice shall apportion the cost of the jury among the several cases and tax it in accordance with justice.

SOURCES: Codes, 1871, § 1328; 1880, § 2224; 1892, § 2426; Laws, 1906, § 2755; Hemingway's 1917, § 2254; Laws, 1930, § 2103; Laws, 1942, § 1837.

Editor's Note — Pursuant to Miss. Const. Art. 6, § 171, all references in the Mississippi Code to justice of the peace shall mean justice court judge.

§ 11-9-147. Trial by jury; fining of delinquent jurors.

The justice of the peace may fine any person summoned as a juror failing to attend in any sum not exceeding ten dollars; and if such person, when summoned to show cause why the fine should not be made final, shall not appear and show cause, execution shall issue for the fine and costs.

SOURCES: Codes, Hutchinson's 1848, ch. 50, art. 10 (7); 1857, ch. 58, art. 27; 1871, § 1329; 1880, § 2225; 1892, § 2427; Laws, 1906, § 2756; Hemingway's 1917, § 2255; Laws, 1930, § 2104; Laws, 1942, § 1838.

Editor's Note — Pursuant to Miss. Const. Art. 6, § 171, all references in the Mississippi Code to justice of the peace shall mean justice court judge.

Cross References — Penalty for juror's failure to perform his duties, see § 13-5-83.

RESEARCH REFERENCES

Am Jur. 47 Am. Jur. 2d, Jury § 168.

CJS. 50 C.J.S., Juries §§ 223, 224.

CHAPTER 11

Venue of Actions

In General	11-11-1
Change of Venue	11-11-51

IN GENERAL

SEC.

- 11-11-1. Provisions of this chapter applicable to all courts.
- 11-11-3. County in which to commence civil actions; dismissal of actions more properly heard in another forum; transfer of action to proper county; factors determining grant of motion to dismiss or transfer.
- 11-11-5 and 11-11-7. Repealed
- 11-11-9. Actions against executors.
- 11-11-11 and 11-11-13. Repealed
- 11-11-15. Actions against State Board of Health or State Board of Medical Licensure.
- 11-11-17. Where court has jurisdiction of subject matter but not venue.
- 11-11-19. Where brought if judge interested.

§ 11-11-1. Provisions of this chapter applicable to all courts.

All things contained in this chapter, not restricted by their nature or by express provision to particular courts, shall be the rules of decision and proceeding in all courts whatsoever.

SOURCES: Codes, Hutchinson's 1848, ch. 53, art. 2 (100); 1857, ch. 61, art. 189; 1871, § 630; 1880, § 1585; 1892, § 629; Laws, 1906, § 687; Hemingway's 1917, § 465; Laws, 1930, § 474; Laws, 1942, § 1412.

Cross References — Transfer of cases from the circuit court to the county court, see § 9-9-27.

Other sections derived from same 1942 code section, see §§ 11-1-57, 11-7-1, 91-1-15.

Venue of actions, suits, and proceedings in the county court, see § 11-9-3.

Application of law of evidence, see § 13-1-1.

Application of law of process generally, see § 13-3-1.

Jurisdiction and venue of criminal offenses generally, see §§ 99-11-1 et seq.

Relief under Mississippi Uniform Post-Conviction Collateral Relief Act, see §§ 99-39-1 et seq.

Venue, see Miss. R. Civ. P. 82.

JUDICIAL DECISIONS

1. In general.
2. Venue.
3. Dismissal.
4. Evidence.

1. In general.

In view of Code 1930, § 474, and Code 1930, §§ 575, 1397, case held triable at return term of circuit court, where sum-

mons was served July 21 and made returnable August 20, as against contention that both day of service and day of return had to be excluded. Mississippi Cent. R.R. v. Aultman, 173 Miss. 622, 160 So. 737 (1935), appeal dismissed, 296 U.S. 537, 56 S. Ct. 108, 80 L. Ed. 382 (1935), overruled on other grounds, Combs v. Adams, 350 So. 2d 41 (Miss. 1977).

By this section [Code 1942, § 1412], the provisions of the chapter are made applicable to all courts, and this embraces the county court; and, accordingly, conviction on a plea of guilty entered on an amendable affidavit is good and cannot be set aside on certiorari because of a defective affidavit. *Bogle v. State*, 155 Miss. 612, 125 So. 99 (1929).

2. Venue.

Venue is right as valuable to defendant as to plaintiff. *Burgess v. Lucky*, 674 So. 2d 506 (Miss. 1996).

In view of this section [Code 1942, § 1412], a fraternal benefit association may be sued in the chancery court of the county in which the beneficiary resides. *Masonic Benefit Ass'n v. Dotson*, 111 Miss. 60, 71 So. 266 (1916).

3. Dismissal.

Where a suit was brought in chancery court for cancelation of a conveyance on the ground that it has never been delivered, the chancellor should have granted the complaint's motion for voluntary dismissal without prejudice where there was no submission to the chancellor for final decision on merits. *Graham v. Graham*, 214 Miss. 99, 58 So. 2d 85 (1952).

A complainant in the chancery court has the right under the statute to dismiss his suit without prejudice. This rule applies in all cases where the defendant will not be prejudiced by a dismissal. *Adams v. Lucedale Com. Co.*, 113 Miss. 608, 74 So. 435 (1917); *Adams v. Dean*, 74 So. 436 (Miss. 1917); *Adams v. Leatherbury*, 74 So. 436 (Miss. 1917); *Adams v. McInnis*, 74 So. 436 (Miss. 1917).

4. Evidence.

Under the provisions of this section [Code 1942, § 1412], Code 1942, § 1469 is applicable to suits in the chancery court. *General Acceptance Corp. v. Holbrook*, 254 Miss. 78, 179 So. 2d 845 (1965).

In action of unlawful entry and detainer, introduction in evidence of deed to plaintiff held not objectionable on ground that no copy of deed was filed as exhibit to declaration, since statute (§ 3458, Code 1930) made no such requirement. *Huff v. Murray*, 171 Miss. 656, 158 So. 475 (1935).

Statutes requiring copy of writing to be annexed to declaration or bill before evidence of writing may be introduced applies to chancery court as well as to circuit court. *Thomas v. B. Rosenberg & Sons*, 153 Miss. 314, 120 So. 732 (1929).

RESEARCH REFERENCES

ALR. Validity of contractual provision limiting place or court in which action may be brought. 31 A.L.R.4th 404.

Venue under 29 USCS § 1132(e)(2) of suits brought under Employee Retirement

Income Security Act of 1974 (29 USCS §§ 1001 et seq). 56 A.L.R. Fed. 757.

Am Jur. 20 Am. Jur. 2d, Courts §§ 35 et seq.

§ 11-11-3. County in which to commence civil actions; dismissal of actions more properly heard in another forum; transfer of action to proper county; factors determining grant of motion to dismiss or transfer.

(1)(a)(i) Civil actions of which the circuit court has original jurisdiction shall be commenced in the county where the defendant resides, or, if a corporation, in the county of its principal place of business, or in the county where a substantial alleged act or omission occurred or where a substantial event that caused the injury occurred.

(ii) Civil actions alleging a defective product may also be commenced in the county where the plaintiff obtained the product.

(b) If venue in a civil action against a nonresident defendant cannot be asserted under paragraph (a) of this subsection (1), a civil action against a nonresident may be commenced in the county where the plaintiff resides or is domiciled.

(2) In any civil action where more than one (1) plaintiff is joined, each plaintiff shall independently establish proper venue; it is not sufficient that venue is proper for any other plaintiff joined in the civil action.

(3) Notwithstanding subsection (1) of this section, any action against a licensed physician, osteopath, dentist, nurse, nurse-practitioner, physician assistant, psychologist, pharmacist, podiatrist, optometrist, chiropractor, institution for the aged or infirm, hospital or licensed pharmacy, including any legal entity which may be liable for their acts or omissions, for malpractice, negligence, error, omission, mistake, breach of standard of care or the unauthorized rendering of professional services shall be brought only in the county in which the alleged act or omission occurred.

(4)(a) If a court of this state, on written motion of a party, finds that in the interest of justice and for the convenience of the parties and witnesses a claim or action would be more properly heard in a forum outside this state or in a different county of proper venue within this state, the court shall decline to adjudicate the matter under the doctrine of forum non conveniens. As to a claim or action that would be more properly heard in a forum outside this state, the court shall dismiss the claim or action. As to a claim or action that would be more properly heard in a different county of proper venue within this state, the venue shall be transferred to the appropriate county. In determining whether to grant a motion to dismiss an action or to transfer venue under the doctrine of forum non conveniens, the court shall give consideration to the following factors:

- (i) Relative ease of access to sources of proof;
- (ii) Availability and cost of compulsory process for attendance of unwilling witnesses;
- (iii) Possibility of viewing of the premises, if viewing would be appropriate to the action;
- (iv) Unnecessary expense or trouble to the defendant not necessary to the plaintiff's own right to pursue his remedy;
- (v) Administrative difficulties for the forum courts;
- (vi) Existence of local interests in deciding the case at home; and
- (vii) The traditional deference given to a plaintiff's choice of forum.

(b) A court may not dismiss a claim under this subsection until the defendant files with the court or with the clerk of the court a written stipulation that, with respect to a new action on the claim commenced by the plaintiff, all the defendants waive the right to assert a statute of limitations defense in all other states of the United States in which the claim was not barred by limitations at the time the claim was filed in this state as necessary to effect a tolling of the limitations periods in those states beginning on the date the claim was filed in this state and ending on the date the claim is dismissed.

SOURCES: Codes, Hutchinson's 1848, ch. 58, art. 1 (19); 1857, ch. 61, art. 32; 1871, § 522; 1880, § 1498; 1892, § 650; Laws, 1906, § 707; Hemingway's 1917, § 486; Laws, 1930, § 495; Laws, 1942, § 1433; Laws, 1908, ch. 166; Laws, 1940, ch. 248; Laws, 1984, ch. 429; Laws, 2002, 3rd Ex Sess, ch. 2, § 1; Laws, 2002, 3rd Ex Sess, ch. 4, § 1; Laws, 2004, 1st Ex Sess, ch. 1, § 1, eff from and after Sept. 1, 2004, and applicable to all causes of action filed on or after Sept. 1, 2004.

Cross References — The venue of actions, suits, and proceedings in the county court, see § 11-9-3.

Change of venue in cases involving trial of right of property, see § 11-23-23.

The venue of criminal prosecutions generally, see §§ 99-11-3 to 99-11-23.

Change of venue in criminal prosecutions, see § 99-15-35.

Venue, see Miss. R. Civ. P. 82.

Amendment Notes — The first 2002 amendment, 3rd Ex Sess, designated the first paragraph as (1), inserted (2), and redesignated the last paragraph as (3).

The second 2002 amendment, 3rd Ex Sess, rewrote (1); deleted (2) and redesignated former paragraph (3) as present paragraph (2).

The 2004 amendment, 1st Ex Sess, rewrote the section.

JUDICIAL DECISIONS

1. In general.
2. Construction and application generally.
3. Jurisdiction.
4. Venue where defendant resides or is found.
5. Venue as to corporations.
6. —Where cause of action occurs or accrues.
7. —Foreign corporations.
8. Municipal corporations.
9. Actions relating to land; ejectment, etc.
10. —Land located in two or more counties.
11. Change of venue in general.
12. —Public officers.
13. —Proceedings in rem.
14. —Consent, effect of.
15. —Waiver.
16. —Burden of proof.

1. In general.

Supreme Court may properly consider issues pertaining to venue via interlocutory appeal. *Forrest County Gen. Hosp. v. Conway*, 700 So. 2d 324 (Miss. 1997).

Venue is valuable right possessed by both plaintiff and defendant. *Forrest County Gen. Hosp. v. Conway*, 700 So. 2d 324 (Miss. 1997).

Venue is right as valuable to defendant as to plaintiff. *Burgess v. Lucky*, 674 So. 2d 506 (Miss. 1996).

Mississippi has rejected common law local action doctrine, and § 11-11-3 alone determines whether court can exercise jurisdiction over "local" cause of action. *Trust Co. Bank v. United States Gypsum Co.*, 950 F.2d 1144 (5th Cir. 1992).

Section [Code 1942, § 1433] fixing venue of suits in state courts either in the district where the cause of action accrues or where the defendant has its principal place of business is inapplicable to prevent a resident of the Federal Northern District of Mississippi from suing a foreign corporation having its principal place of business in the Southern District in the Federal court of the Northern District rather than the Southern District, even though in obedience to laws of Mississippi the corporation had designated an agent for service of process who resided in the Southern District and the cause of action accrued in that district, where a Federal statute fixing venue permitted suit in either the Northern or the Southern District. *Murphree v. Mississippi Pub. Corp.*, 149 F.2d 138 (5th Cir. 1945), *aff'd*, 326 U.S. 438, 66 S. Ct. 242, 90 L. Ed. 185 (1946).

The statute, with respect to change of venue in suits against public officers, is not discriminatory. *Pan Am. Petro. Corp. v. Pate*, 157 Miss. 822, 126 So. 480 (1930), error overruled, 157 Miss. 834, 128 So.

870 (1930), overruled on other grounds, *Vasco v. Ford*, 212 Miss. 370, 54 So. 2d 541 (1951).

Statute relating to venue of civil actions held not to discriminate against foreign corporations. *Hercules Powder Co. v. Tyrone*, 155 Miss. 75, 124 So. 74 (1929), error overruled, 155 Miss. 90, 124 So. 475 (1929).

2. Construction and application generally.

Where the insurer alleged that the insured committed insurance fraud, the insured's assertion that it was an *in personam* action, with venue in the county where the insured resided, was rejected; the specific terms of Miss. Code Ann. § 11-5-1 regarding venue for real and personal property actions, prevailed over the general terms of Miss. Code Ann. § 11-11-3, which placed venue generally in the county of the defendant's residence, thus, venue was properly in the county of the insurer's office where the certificates were issued, and from where the claims were paid. *Guice v. Miss. Life Ins. Co.*, 836 So. 2d 756 (Miss. 2003).

Of right, plaintiff selects among permissible venues, and his choice must be sustained unless, in the end, there is no factual basis for claim of venue. *Forrest County Gen. Hosp. v. Conway*, 700 So. 2d 324 (Miss. 1997).

Venue in wrongful death action alleging medical malpractice was proper either in county in which patient died some six months after allegedly negligent care was rendered, or in county in which that care was rendered. *McMillan v. Puckett*, 678 So. 2d 652, 58 A.L.R.5th 917 (Miss. 1996), reh'g denied (Miss. Aug. 22, 1996).

Terms "occurs" and "accrues," as used in venue statute, are not synonymous, legally or otherwise. *McMillan v. Puckett*, 678 So. 2d 652, 58 A.L.R.5th 917 (Miss. 1996), reh'g denied (Miss. Aug. 22, 1996).

Cause of action "accrues," for venue purposes, when it comes into existence as enforceable claim, that is, when right to sue becomes vested; this may well mean moment injury is inflicted, that point in space and time when last legally significant fact is found. *McMillan v. Puckett*, 678 So. 2d 652, 58 A.L.R.5th 917 (Miss. 1996), reh'g denied (Miss. Aug. 22, 1996).

Cause of action must exist and be complete before action can be commenced, and, when suit is begun before cause of action accrues, it will generally be dismissed if proper objection is made. *McMillan v. Puckett*, 678 So. 2d 652, 58 A.L.R.5th 917 (Miss. 1996), reh'g denied (Miss. Aug. 22, 1996).

If plaintiff selects among permissible venues, his choice must be sustained unless in end there is no credible evidence supporting factual basis for claim of venue; put otherwise, plaintiff must be given benefit of reasonable doubt. *McMillan v. Puckett*, 678 So. 2d 652, 58 A.L.R.5th 917 (Miss. 1996), reh'g denied (Miss. Aug. 22, 1996).

For purposes of venue, cause of action in wrongful death case may occur and/or accrue in both county where death occurred and county where alleged negligence took place, making either county, if they are different, permissible venue. *Burgess v. Lucky*, 674 So. 2d 506 (Miss. 1996).

Wrongful death action arising out of medical care and/or treatment rendered to decedent by physicians was properly venued either in county where alleged negligence occurred or in county where decedent died. *Burgess v. Lucky*, 674 So. 2d 506 (Miss. 1996).

There is no language in § 11-11-5 suggesting that it is the only venue statute to which parties may resort in an action against a railroad. If one of the 3 alternative tests for venue in the railroad venue statute be met, the parties are limited to those 3 choices. However, where one of the tests for venue under the railroad venue statute is not met, the language of the statute does not exhaust the possibility of proper venue against the railroad. The railroad venue statute, because it employs the permissive "may," requires that it be read in conjunction with the general venue statute, § 11-11-3, which provides that actions "shall" be commenced in one of the counties authorized, "except where otherwise provided." *Missouri Pac. R.R. v. Tircuit*, 554 So. 2d 878 (Miss. 1989).

In an action to set aside an allegedly fraudulent conveyance of personal property, venue was in the county in which the property was located since the specific

terms of Code 1972, § 11-5-1 prevail over the general terms of Code 1972, § 11-11-3. *Green v. Winona Elevator Co.*, 319 So. 2d 224 (Miss. 1975).

In a replevin action, a motion to exclude evidence offered by the plaintiff and direct a verdict for the defendants on the ground that the court lacked venue jurisdiction, made at the conclusion of plaintiff's evidence, was not timely. *Ainsworth v. Blakeney*, 232 Miss. 297, 98 So. 2d 880 (1957).

Where there are two or more defendants to a transitory cause of action the venue of which is fixed by statute in either of two or more counties, the plaintiff or complainant may elect to bring the suit in either county, provided that the defendant in the county where the suit is brought is a material party and there is a valid cause of action against him and he is not fraudulently joined for the purpose of fixing venue. *Myers v. Vinson*, 212 Miss. 85, 54 So. 2d 168 (1951).

Plaintiff should not be permitted to fix venue by agreement with alleged joint tort-feasor when so to do will destroy statutory right of joint tort-feasor as to venue of cause against him. *Nicholson v. Gulf, M. & N.R. Co.*, 177 Miss. 844, 172 So. 306 (1937).

Allegations of declaration are not conclusive on question of proper venue. *Trolio v. Nichols*, 160 Miss. 615, 133 So. 207 (1931); *Long v. Patterson*, 198 Miss. 554, 22 So. 2d 490 (1945).

Statute fixing venue in action against railroad in any county in which line of railroad runs is applicable only when railroad is sued alone; suit against two or more railroads as necessary defendants or against several defendants living in separate counties falls under provisions of general venue statutes. *Clark v. Louisville & N.R. Co.*, 158 Miss. 287, 130 So. 302 (1930).

The statute does not apply to a suit of replevin. *Ellison v. Lewis*, 57 Miss. 588 (1880).

3. Jurisdiction.

Although compelling interests, such as territorial limits inherent in in rem title dispute or internal police regulations of foreign state, can in some cases permit, but not require, Mississippi Court to

forego exercise of its judicial power. No such compelling interests exist in action brought by building owner against company which designed and manufactured fire-proofing materials containing asbestos which were installed in plaintiff's building. *Trust Co. Bank v. United States Gypsum Co.*, 950 F.2d 1144 (5th Cir. 1992).

Dismissal, after settlement, of the defendant residing in the county in which suit was brought, does not affect jurisdiction of the suit in such county against the nonresident defendant. *New Biloxi Hosp. v. Frazier*, 245 Miss. 185, 146 So. 2d 882 (1962).

Court should refuse to exercise jurisdiction obtained by agreement with one of two joint tort-feasors, since result thereof constitutes fraud on jurisdiction of court, and such acts become fraudulent in nature, where purpose and result is to defeat right guaranteed by law, notwithstanding that lawful act does not become unlawful merely because it may be done by agreement between parties. *Nicholson v. Gulf, M. & N.R. Co.*, 177 Miss. 844, 172 So. 306 (1937).

Defendant in county of whose residence action was brought against several must be a material defendant, proper party, and not joined for the sole purpose of conferring jurisdiction. *Trolio v. Nichols*, 160 Miss. 615, 133 So. 207 (1931).

Actions other than local must be commenced in the county in which the defendants or some of them may be found, and jurisdiction does not attach where defendant is served with process from a county other than his residence. *Cook v. Pitts*, 114 Miss. 39, 74 So. 777 (1917).

4. Venue where defendant resides or is found.

Medical malpractice action against hospital and physician at hospital, which was based on alleged negligence in failing to diagnose disease of child patient, occurred or accrued, for purposes of venue statute in county where hospital was located, and not in separate county where injuries manifested themselves after patient was transferred to university hospital, and thus, county where university hospital was located, in which neither plaintiff nor any of named defendants resided, was not

proper venue for action. *Forrest County Gen. Hosp. v. Conway*, 700 So. 2d 324 (Miss. 1997).

In suits involving multiple defendants, where venue is good as to one defendant, it is good as to all defendants. This is true where the defendant upon whom venue is based is subsequently dismissed from the suit. In such situations, venue as to the remaining defendants continues despite the fact that venue would have been improper if the original action had named them only. *Blackledge v. Scott*, 530 So. 2d 1363 (Miss. 1988).

The right to be sued in the county of one's residence is a valuable right. *Crosby v. Robertson*, 243 Miss. 420, 137 So. 2d 916 (1962).

The staying, for 45 days, of an order granting a change of venue of an action dismissed as to a resident defendant, to the county in which the other defendants reside, is ineffectual to retain jurisdiction to render judgment, where the application for a stay merely states that it has been discovered that another resident of the county should be named as a defendant, without giving his name, stating how he is involved, or what facts created his liability. *Crosby v. Robertson*, 243 Miss. 420, 137 So. 2d 916 (1962).

A judgment recovered in an action brought in Forrest County, place of plaintiff's residence, for the value of certain merchandise allegedly sold to a resident of Jones County, upon whom service was made by leaving a copy of the summons with his wife, was void. *Bryant v. Lovitt*, 231 Miss. 736, 97 So. 2d 730 (1957).

Where a default judgment recovered in an action brought in Forrest County, place of plaintiff's residence, for the value of certain merchandise allegedly sold to the resident of Jones County, upon whom service was made by leaving a copy of the summons with defendant's wife, was void, the defendant was not compelled to appear in the case and move for change of venue to the county of his residence; nor did he submit himself to the jurisdiction of the court and waive venue of the action by attacking the legality of the summons, the validity of judgment, and denying his liability to the plaintiff. *Bryant v. Lovitt*, 231 Miss. 736, 97 So. 2d 730 (1957).

Proper venue of mandamus proceeding against commissioner of Mississippi Highway Safety Patrol is public officer's official domicile, that is, the City of Jackson in the First Judicial District of Hinds County. *Birdsong v. Grubbs*, 208 Miss. 123, 43 So. 2d 878 (1950).

Circuit Court of Lamar County had venue of personal action against resident of Lauderdale County when joined with a defendant who was resident of Lamar County, though local resident had been judicially declared non compos mentis, was personally served with summons under original declaration to which his guardian was not a party, and later served with summons issued on amended complaint for guardian and ward, after service of summons and copy issued on amended complaint was served on his guardian. *Owen v. Sumrall*, 204 Miss. 15, 36 So. 2d 800 (1948).

Right of a citizen to be sued in the county of his residence is a valuable right, and, when there are several defendants in a non-local civil action residing in different counties, the action must be brought in the county of the residence of a real and material defendant. *Long v. Patterson*, 198 Miss. 554, 22 So. 2d 490 (1945).

Good faith of plaintiff in joining as party defendant resident of county in which action is commenced with residents of another county, is pertinent only where the facts of liability vel non against a resident defendant are involved in a complicated set of circumstances from which, when fully developed, more than one reasonable conclusion might be drawn by the jury or where because of nice distinctions to be applied as a matter of law, it cannot be told in advance of a full development of the case whether the resident defendant will be held liable by the courts. *Long v. Patterson*, 198 Miss. 554, 22 So. 2d 490 (1945).

In action for death of automobile occupant, declaration alleging that deceased's driver failed to exercise reasonable care to avoid collision with driver of another automobile crossing intersection at high speed stated cause of action against both drivers, and hence venue should not be changed from county of first driver's residence. *Daniel v. Livingstone*, 168 Miss. 311, 150 So. 662 (1933).

Defendant in county of whose residence action was brought against several must be material defendant, proper party, and not joined for sole purpose of conferring jurisdiction. *Trolio v. Nichols*, 160 Miss. 615, 133 So. 207 (1931).

Where defendant in whose county action against several is brought is joined for fraudulent purpose of conferring jurisdiction, cause will be dismissed or transferred. *Trolio v. Nichols*, 160 Miss. 615, 133 So. 207 (1931).

Judgment against defendant, a nonresident of county of suit, held voidable, if not void, where resident defendant was not served with process. *Perry v. Nolan & Maris*, 159 Miss. 384, 131 So. 252 (1930).

Manufacturer's agent may be joined as defendant in suit based on negligence in permitting deleterious substances in drinks; agent of manufacturer was properly joined in suit for permitting deleterious substances in drinks and venue properly laid in county where agent is doing business. *Bufkin v. Grisham*, 157 Miss. 746, 128 So. 563 (1930).

Where there are two defendants suit may be brought in the county of the residence of either. *Indianola Cotton Oil Co. v. Crowley*, 121 Miss. 262, 83 So. 409 (1920).

Under Acts 1894, ch 64, no exception is created to the rule embodied in Code 1892, § 650 (Code 1906, § 707), and a foreign surety company under that act could only be sued in the circuit court of a county in which it has an agent upon whom process could there be served. *American Sur. Co. v. City of Holly Springs*, 77 Miss. 428, 27 So. 612 (1900).

Where the defendant, after the commencement of a suit but before the service of process on him, removes into another county, plaintiff may have a testatum writ. *Andrews v. Powell*, 41 Miss. 729 (1868).

Where an action is begun against several persons and none are served in the county, and the suit is dismissed as to those who reside there, and who have never been served, jurisdiction will be gone. *Wolley v. Bowie*, 41 Miss. 553 (1867).

If the defendant in the county be served, the suit may be discontinued as to him without losing jurisdiction. *Read v. Renaud*, 14 Miss. (6 S. & M.) 79 (1846).

Where duplicate writs are issued and are served upon all of the defendants in a county other than that in which the suit was brought, and the process to the county where the suit is brought was returned "not found" as to all, the court should dismiss the case for want of jurisdiction on a showing that all defendants, at the time the suit was begun, lived out of the county. *Bank of Vicksburgh v. Jennings*, 6 Miss. (5 Howard) 425 (1841).

5. Venue as to corporations.

Venue of a mandamus action by Hancock County to compel the state highway commission to appraise and reimburse such county its proportionate value of a bridge constructed by Hancock and Harrison counties, which had been taken over by the highway commission and had become a part of United States Highway 90, was in Hinds County, where the state highway commission had its permanent office. *State ex rel. Cowan v. State Hwy. Comm'n*, 195 Miss. 657, 13 So. 2d 614 (1943).

Chancery court of county from which domestic corporation, garnished as debtor of foreign bank in attachment suit against latter, moved its property, office, and place of stockholders' meeting, as permitted by its charter, before issuance of process for it to sheriff of such county, had no territorial jurisdiction of such bank or garnishee. *Estes v. Bank of Walnut Grove*, 172 Miss. 499, 159 So. 104 (1935).

Employee's suit for personal injuries against employer, a domestic corporation, held not maintainable in county where corporation was not domiciled or other than where injuries were received. *Batson & Hatten Lumber Co. v. McDowell*, 159 Miss. 322, 131 So. 880 (1931).

"Principle place of business" is synonymous with domicile in determining venue. *Plummer-Lewis Co. v. Francher*, 111 Miss. 656, 71 So. 907 (1916).

6. —Where cause of action occurs or accrues.

Venue in an action which included an automobile insurance company as a defendant was not proper under Miss. Code Ann. § 11-11-7 [Repealed] because a policy issued by an insurance company located in that county covered the insured

vehicle for liability only and not property damage occurring in a one-car accident; venue was however proper under Miss. Code Ann. § 11-11-3 as the accident occurred in the first county, and the trial court therefore erred in transferring venue in an action brought by the insured parties from the first county to the county where the other defendants were located. *Stubbs v. Miss. Farm Bureau Cas. Ins. Co.*, 825 So. 2d 8 (Miss. 2002).

In a personal injury action brought against an airline charter corporation arising from injuries allegedly caused by the shifting of improperly loaded cargo, venue was proper in the county where the cargo was loaded onto the plane, even though the plaintiff's injury occurred at an airport in another state, since a civil action against a corporation is proper in the county where the cause of action occurred, and the injury could not have occurred had it not been for the negligent loading of the airplane. *Flight Line v. Tanksley*, 608 So. 2d 1149 (Miss. 1992).

In a proceeding upon attachment in chancery to recover for injuries received and to attach nonresident corporate defendant's funds and property at the hands of Mississippi corporation, which operated a motor transportation line in Winston County, and a person residing in Choctaw County, although another defendant resided in Hinds County venue was properly laid in Winston County. *Continental S. Lines v. Wicker*, 217 Miss. 856, 65 So. 2d 272 (1953).

In an action to recover damages for breach of contract to furnish and install an ice cream freezing unit, the cause of action against a foreign corporation authorized to do business in the state accrued in the county in which the failure to install the unit occurred and therefore the venue was fixed there. *Southern Wholesalers v. Stennis Drug Co.*, 214 Miss. 461, 59 So. 2d 78 (1952).

A cause of action for libel against a newspaper accrues where the paper is first published. *Forman v. Mississippi Publishers Corp.*, 195 Miss. 90, 14 So. 2d 344, 148 A.L.R. 469 (1943).

In libel action against newspaper, having its place of business in Hinds county, cause of action accrued in Hinds county

where alleged libelous matter was first published and circulated, and the fact that the alleged libel was also circulated in Sunflower county through a local distributor, did not establish a new and separate cause of action in Sunflower county. *Forman v. Mississippi Publishers Corp.*, 195 Miss. 90, 14 So. 2d 344, 148 A.L.R. 469 (1943).

Where alleged libel was published by a newspaper corporation in Hinds County, joinder of distributor, circulating paper in Sunflower County, who was not an agent or servant of publisher and who was free to dispose of papers as she saw fit, was not effective to fix venue in Sunflower County. *Forman v. Mississippi Publishers Corp.*, 195 Miss. 90, 14 So. 2d 344, 148 A.L.R. 469 (1943).

Consumer's cause of action for illness resulting from drinking portion of contents of bottle of soda water containing decomposed bodies of roaches held to have "occurred or accrued" in county where drink was purchased and consumed, and not where bottled. *Coca-Cola Bottling Co. v. Cox*, 174 Miss. 790, 165 So. 814 (1936).

Under statute fixing venue of actions against domestic corporations in county where domiciled or in county where cause of action accrued, venue of action against domestic corporation for malicious prosecution held in county where prosecution complained of terminated in defendant's favor, since cause of action could not come into existence until such termination. *Grenada Bank v. Petty*, 174 Miss. 415, 164 So. 316 (1935).

Where accident resulting in death occurred in J. county, circuit court of J. county had jurisdiction of action for death against domestic corporation domiciled in another county. *Natchez Coca-Cola Bottling Co. v. Watson*, 160 Miss. 173, 133 So. 677 (1931).

Foreign corporation designating resident agent could be sued in circuit court of county where transitory cause of action accrued. *Sandford v. Dixie Constr. Co.*, 157 Miss. 626, 128 So. 887 (1930).

Foreign corporation designating resident agent is placed, as regards venue in transitory action, in same position as domestic corporation. *Sandford v. Dixie Constr. Co.*, 157 Miss. 626, 128 So. 887 (1930).

7.—Foreign corporations.

In a proceeding upon attachment in chancery to recover for injuries received and to attach nonresident corporate defendant's funds and property at the hands of Mississippi corporation, which operated a motor transportation line in Winston County, and a person residing in Choctaw County, although another defendant resided in Hinds County venue was properly laid in Winston County. *Continental S. Lines v. Wicker*, 217 Miss. 856, 65 So. 2d 272 (1953).

This section [Code 1942, § 1433] applies to foreign corporations who are subject to the same rights and disabilities as to venue as are domestic corporations. *Southern Wholesalers v. Stennis Drug Co.*, 214 Miss. 461, 59 So. 2d 78 (1952).

In an action to recover damages for breach of contract to furnish and install an ice cream freezing unit, the cause of action against a foreign corporation authorized to do business in the state accrued in the county in which the failure to install the unit occurred and therefore the venue was fixed there. *Southern Wholesalers v. Stennis Drug Co.*, 214 Miss. 461, 59 So. 2d 78 (1952).

A foreign corporation, which has appointed a resident agent, is subject to the same rights and disabilities as to venue as are domestic corporations. *Forman v. Mississippi Publishers Corp.*, 195 Miss. 90, 14 So. 2d 344, 148 A.L.R. 469 (1943).

Suit by domestic corporation against foreign corporation for breach of contract to buy piling, in procuring piling from subproducers in another state, thus preventing delivery by plaintiff, could not be brought in county of plaintiff's domicile but only in county of defendant's domicile, since cause of action, if any, occurred or accrued without the state. *McLeod Lumber Co. v. Manassa Timber Co.*, 180 Miss. 552, 178 So. 83 (1938).

Foreign corporation designating resident agent could be sued in circuit court of county where transitory cause of action accrued. *Sandford v. Dixie Constr. Co.*, 157 Miss. 626, 128 So. 887 (1930).

Foreign corporation designating resident agent is placed, as regards venue in transitory action, in same position as domestic corporation. *Sandford v. Dixie*

Constr. Co., 157 Miss. 626, 128 So. 887 (1930).

Mortgagor may sue for relief against sales of mortgaged property contrary to agreement in county where general agent of nonresident insurance company whose policy was assigned to mortgagees is found; and his bill for relief in such case is not multifarious for joining insurance company. *Tchula Com. Co. v. Jackson*, 147 Miss. 296, 111 So. 874 (1927).

A foreign corporation may be found in any county in which it has an agent upon whom process can be served. *Dean v. Brannon*, 139 Miss. 312, 104 So. 173 (1925).

8. Municipal corporations.

This section [Code 1942, § 1433] does not apply to a municipality. *City of Jackson v. Wallace*, 189 Miss. 252, 196 So. 223 (1940).

A suit for personal injuries against a power company and a municipality, brought in a county where the power company had a power line but not in the county of the municipality's domicile, could not be maintained against the municipality in such county. *City of Jackson v. Wallace*, 189 Miss. 252, 196 So. 223 (1940).

9. Actions relating to land; ejectment, etc.

Where the plaintiff alleged an actual physical invasion of the subject property in a "nuisance" cause of action, the action was actually one for trespass to realty and was thus subject to the local action doctrine. *Donald v. Amoco Prod. Co.*, 735 So. 2d 161 (Miss. 1999).

Statute recognizes only 3 categories of "local" actions: actions of trespass on land; ejectment proceedings; and actions for statutory penalty for cutting and boxing trees and firing woods. *Trust Co. Bank v. United States Gypsum Co.*, 950 F.2d 1144 (5th Cir. 1992).

Action by building owner to recover cost of asbestos abatement program against company which designed and manufactured fire-proofing materials that contained asbestos which were installed in building owned by plaintiff does not fall within any of 3 categories of "local" action (trespass on land; ejectment; cutting and

boxing trees and firing woods), thus was not local action under Mississippi law, and courts in Mississippi, including Federal District Court, properly could exercise jurisdiction over it. *Trust Co. Bank v. United States Gypsum Co.*, 950 F.2d 1144 (5th Cir. 1992).

Where defendants resided in another county, an action for value of timber cut was properly laid in county in which land was situated. *Bassett v. Stringer*, 216 Miss. 766, 63 So. 2d 234 (1953).

Where suit to recover the value of trees cut and removed from plaintiff's land and the statutory penalty therefor was brought in the wrong county and it was transferred to the proper county and received by the clerk thereof, and plaintiff was not a nonresident nor was she shown to have been insolvent, it was the duty of the clerk of court of the latter county to enter the cause on his dockets as if it had been commenced in such court without requiring security for costs, his only right to obtain security for cost being that prescribed by law after commencement of suit. *Neely v. Martin*, 193 Miss. 856, 11 So. 2d 435 (1943).

Action for trespass on land is not a "transitory action." *Sharp v. Learned*, 182 Miss. 333, 181 So. 142 (1938), error overruled, 182 Miss. 344, 182 So. 122 (1938).

An action is not "an action of trespass on land" within meaning of the statute unless there exist the elements of force and entry necessary to constitute the common-law action of *quare clausum fregit*. *Archibald v. Mississippi & T.R. Co.*, 66 Miss. 424, 6 So. 238 (1889).

Ejectment and trespass *quare clausum fregit* are the only ordinary actions which can be brought in a county where the defendant does not reside and is not found. *Elder v. Hilzheim & Anderson*, 35 Miss. 231 (1858); *Archibald v. Mississippi & T.R. Co.*, 66 Miss. 424, 6 So. 238 (1889).

10. —Land located in two or more counties.

Venue of action for setting fire to grass on defendants' land in two counties and burning bridge on road in J. county held in L. county where defendants resided. *Jefferson Davis County v. Riley*, 158 Miss. 473, 129 So. 324 (1930).

In a suit for trespass on lands lying in two counties and the defendant resides in one of the counties, suit must be brought in the county of defendant's residence. *Kraus v. Stewart*, 122 Miss. 503, 84 So. 463 (1920).

11. Change of venue in general.

Denial of the general hospital's and physicians' motion to transfer venue in a medical malpractice action was improper under the Mississippi Tort Claims Act (MTCA), Miss. Code Ann. § 11-46-1 et seq., where the general hospital was entitled to venue in the county in which the principal offices were located, Miss. Code Ann. § 11-11-3(1), because the decedent's heirs failed to assert a reasonable claim of liability against the medical center and treating physicians. *Wayne Gen. Hosp. v. Hayes*, 868 So. 2d 997 (Miss. 2004).

Trial court abused its discretion in denying a motion by a hospital and three physicians to transfer venue in a medical malpractice action because a decedent's heirs had failed to assert a reasonable claim of liability against certain defendants that had been dismissed from the action and because the hospital was a community hospital under the Mississippi Tort Claims Act and was entitled to venue in the county in which its governing body's principal offices were located. *Wayne Gen. Hosp. v. Hayes*, — So. 2d —, 2003 Miss. LEXIS 598 (Miss. Nov. 6, 2003).

On a motion for a change of venue, it was a question of fact for the circuit court as to whether the defendant was a resident of Covington or Jasper Counties. *Buckley v. Guilbert*, 250 Miss. 240, 164 So. 2d 743 (1964).

Since a corporation is not entitled to file a motion for change of venue, the circuit court correctly refused to change the venue in a replevin action upon the sole motion of the corporation. *Ainsworth v. Blakeney*, 232 Miss. 297, 98 So. 2d 880 (1957).

Where an action was brought against the administrator of an estate and two other defendants within four days after the administrator was issued letters, but the administrator did not object that the action was prematurely brought, the codefendants of the administrator could not, on a motion for change of venue, raise the

question. *Great S. Box Co. v. Barrett*, 231 Miss. 101, 94 So. 2d 912 (1957).

In a death action arising out of a motor vehicle collision, defendants' motion for a change of venue, which charged that the plaintiff had failed to show any negligence on the part of the decedent so that the sole purpose of joining the administrator of decedent's estate was to destroy the venue rights of the defendants, was properly overruled since defendants had denied negligence and had affirmatively alleged that decedent's negligence was the sole proximate cause of the collision, they could not, without changing their position, withhold their evidence to establish decedent's negligence, and thus nullify the proceedings by change of venue, and because plaintiff's evidence had made a jury case as to the decedent's negligence. *Great S. Box Co. v. Barrett*, 231 Miss. 101, 94 So. 2d 912 (1957).

Action of attorneys for plaintiff, who had a cause of action arising out of a motor vehicle collision, in actively participating in securing the appointment of another as administrator of decedent's estate in order that the action against the decedent's estate might be brought in Simpson County and thus draw two other codefendants into the circuit court of that county was not improper, in the absence of a fraudulent agreement between plaintiff's attorneys and the administrator, so that the codefendant's motion for a change of venue was properly denied. *Great S. Box Co. v. Barrett*, 231 Miss. 101, 94 So. 2d 912 (1957).

Where an automobile collision occurred in one county and the two defendants resided in another county, the plaintiff had the option of bringing suit either in the county where the accident occurred or in the county where the defendants resided and the venue could not be changed upon the application of either defendant since it appeared that both defendants were material parties, that there was a valid cause of action against both and that neither was fraudulently joined for the purpose of fixing the venue. *F.B. Walker & Sons v. Rose*, 223 Miss. 494, 78 So. 2d 592 (1955).

Fourteen-year-old boy who agreed to warn driver of farm tractor on highway of

approaching traffic was not a real party to an action brought in the county of the boy's residence against the boy and the driver and owners, who resided in another county, of a truck which collided with the tractor, for the death of the driver of the tractor, since the boy could not be held liable in tort for failure to have given such warning, and therefore motion by the non-resident defendants for change of venue to the county of their residence should have been granted. *Long v. Patterson*, 198 Miss. 554, 22 So. 2d 490 (1945).

Defendant, a traveling salesman for a foreign corporation, who was unmarried and had no home or fixed place of residence in the state, but often stayed at a hotel in Biloxi as a place of rest and relaxation, was not entitled to have suit against him for personal injuries transferred from Jefferson Davis county, where accident had occurred and process was served, to Harrison county. *Knower v. Baldwin*, 195 Miss. 166, 15 So. 2d 47 (1943).

In libel action against newspaper publishing company in Sunflower County, action was properly dismissed without prejudice where cause of action arose in Hinds County where defendant corporation was domiciled, since there is no authority to change the venue of such suit against the corporation to Hinds County. *Forman v. Mississippi Publishers Corp.*, 195 Miss. 90, 14 So. 2d 344, 148 A.L.R. 469 (1943).

The venue in a civil action should be changed on request of the party entitled thereto whenever the condition therefor arises. *Howard v. Ware*, 192 Miss. 36, 3 So. 2d 830, 140 A.L.R. 1284 (1941); *Long v. Patterson*, 198 Miss. 554, 22 So. 2d 490 (1945).

A defendant's request for a change of venue to the county of her residence, which would have been the proper venue but for the joinder of a codefendant, should be granted when the plaintiff rests his case without attempting to prove liability on the part of the codefendant. *Howard v. Ware*, 192 Miss. 36, 3 So. 2d 830, 140 A.L.R. 1284 (1941).

That the court permitted a judgment against a codefendant, notwithstanding the fact that the plaintiff rested without any attempt to establish liability on its

part, does not deprive the defendant of a right to a change of venue at that stage of the case to the county of her residence, which would have been the proper venue but for the joinder of the codefendant. *Howard v. Ware*, 192 Miss. 36, 3 So. 2d 830, 140 A.L.R. 1284 (1941).

A motion by a defendant, in an action against him for personal injury suffered when a wooden awning attached to his building and extending over the sidewalk fell upon the plaintiff, to change the venue of the action from Forrest County to Lamar County, the residence of the defendant, on the ground that a municipality was fraudulently joined as a defendant to the suit for the purpose of depriving the defendant of his right under this section to have the case tried in Lamar County, was properly overruled where the court had not yet determined whether a municipality was charged with the duty of exercising reasonable care to prevent the awning from falling and injuring persons using the sidewalk. *Weems v. Lee*, 185 Miss. 98, 187 So. 531 (1939).

In employee's action against foreign corporation brought in county in which corporation had its business localized, defendant held not entitled to change venue to county of principal office; "found" defined. *Hercules Powder Co. v. Tyrone*, 155 Miss. 75, 124 So. 74 (1929), error overruled, 155 Miss. 90, 124 So. 475 (1929).

Law authorizing change of venue held inapplicable to suits pending at time of enactment. *State ex rel. Thompson v. Cloud*, 146 Miss. 642, 112 So. 19 (1927), appeal after remand, 150 Miss. 697, 116 So. 814 (1928); *Strickland v. Busby*, 146 Miss. 649, 111 So. 133 (1927).

Venue of suit in county of office of non-resident corporation, necessary defendant, will not be changed because citizen of another county is party thereto. *Tchula Com. Co. v. Jackson*, 147 Miss. 296, 111 So. 874 (1927).

The state may provide different rules as to venue between citizens and corporations provided such rule does not materially affect the liability of the defendant, and the provision with reference to change of venue to the county of the defendant's residence applies only to citizens. *Morrinac Veneer Co. v. McCalip*, 129 Miss. 671, 92 So. 817 (1922).

The statute in so far as it provides for a change of venue in the case of a resident citizen but denies the right to a corporation does not violate the equal protection clause of the 14th Amendment. *Morrinac Veneer Co. v. McCalip*, 129 Miss. 671, 92 So. 817 (1922).

It was error to refuse a change of venue as to an action, not local, in which defendant was served with process from a county other than that of his residence. *Cook v. Pitts*, 114 Miss. 39, 74 So. 777 (1917).

The right to a change of venue is not accorded a corporation. *Plummer-Lewis Co. v. Francher*, 111 Miss. 656, 71 So. 907 (1916); *Morrinac Veneer Co. v. McCalip*, 129 Miss. 671, 92 So. 817 (1922); *Nicholson v. Gulf, M. & N.R. Co.*, 177 Miss. 844, 172 So. 306 (1937).

If the party entitled to a change of venue fails to apply therefor, the court may render judgment. *Christian v. O'Neal*, 46 Miss. 669 (1872); *Cain v. Simpson*, 53 Miss. 521 (1876).

The rule as to change of venue applies to an executor or administrator. *McLeod v. Shelton & Minor*, 42 Miss. 517 (1869).

12. —Public officers.

It is reversible error for trial court to overrule motion for change of venue to official domicile made by commissioner of state highway patrol in mandamus proceeding brought in county other than his official domicil, where no case for relief is stated against patrolmen who were joined with commissioner as defendants for sole purpose of retaining venue in county in which proceeding is filed. *Birdsong v. Grubbs*, 208 Miss. 123, 43 So. 2d 878 (1950).

A mandamus action by a county to compel the state highway commission to appraise and reimburse such county its proportionate value of a bridge constructed by Hancock and Harrison Counties, which had been taken over by the highway commission and made a part of United States Highway 90, was properly transferred to Hinds County, in which the commission had its permanent office. *State ex rel. Cowan v. State Hwy. Comm'n*, 195 Miss. 657, 13 So. 2d 614 (1943).

In action to recover damages for alleged tort against a sheriff (a nonresident of the

county), his surety, a nonresident corporation, and certain resident garnishee defendants, the defendants were entitled to have the venue changed to the county of the sheriff's residence, in view of the statute providing for the change of venue of an action against a public officer to the county of his residence upon his application, notwithstanding another provision that "all cases not otherwise provided may be brought in the chancery court of any county where the defendant, or any necessary party defendant, may reside or be bound." *Holyfield v. State*, 194 Miss. 91, 10 So. 2d 841 (1942).

Purpose of 1926 amendment to venue statute giving public officer sued out of county of his residence the right to have venue changed to county of his residence was to guarantee to public officer the right to remove suit to county of his residence, notwithstanding that surety on his official bond might be found doing business in county where suit was originally filed. *Tucker v. Gurley*, 176 Miss. 708, 170 So. 230 (1936).

Statute giving public officer sued out of county of his residence the right to have venue changed to county of his residence held not to prevent full operation of statute providing for change of venue, or to confer any different right from that granted to any other Mississippi citizen sued on nonlocal action out of county of his residence. *Tucker v. Gurley*, 176 Miss. 708, 170 So. 230 (1936).

Change of venue of action for wrongful killing by deputy sheriffs, to county other than county of deputy sheriffs' residence, held not error. *Tucker v. Gurley*, 176 Miss. 708, 170 So. 230 (1936).

Motion in justice court from which execution issued and circuit court to which cause was appealed to charge sheriff of another county and surety with sheriff's failure to levy execution could not be transferred to circuit court of county of sheriff's residence. *Womack v. Richardson*, 168 Miss. 347, 151 So. 173 (1933).

Corporation or individual jointly sued with another in county in which joint defendant may be found cannot change venue to county of residence; statute authorizing change of venue to county of defendant's residence, notwithstanding

codefendant is subject to action in county, held applicable only to public officer; statute authorizing change of venue to county of defendant public officer's residence, notwithstanding joinder of codefendant subject to action in county, held not discriminatory. *Pan Am. Petro. Corp. v. Pate*, 157 Miss. 822, 126 So. 480 (1930), error overruled, 157 Miss. 834, 128 So. 870 (1930), overruled on other grounds, *Vasco v. Ford*, 212 Miss. 370, 54 So. 2d 541 (1951).

Statute held not to warrant change of venue to county of public officer's residence in cause pending at its passage. *State ex rel. Thompson v. Cloud*, 146 Miss. 642, 112 So. 19 (1927), appeal after remand, 150 Miss. 697, 116 So. 814 (1928).

Motions against sheriffs for failure to return executions are determinable in the court to which the execution is returnable, and a change of venue will not be granted to the county of the officer's residence. *Cox v. Ross*, 56 Miss. 481 (1879).

13. —Proceedings in rem.

Purchaser held not entitled to removal of proceeding to enforce purchase money lien on automobile seized in county of seller's residence. *Eaton v. Hattiesburg Auto Sales Co.*, 151 Miss. 211, 117 So. 534 (1928).

The statute for change of venue does not apply in favor of a defendant in attachment brought in a county other than that of his residence, where jurisdiction has been secured by a levy on effects or debts of the defendant. *Smith v. Mulhern*, 57 Miss. 591 (1880).

14. —Consent, effect of.

A suit in trespass *quare clausum fregit* cannot be removed by consent from one county to another. *Wilkinson v. Jenkins*, 77 Miss. 603, 27 So. 611 (1900).

15. —Waiver.

Where timely objection was not made, as specifically required by Code 1942, § 1433, venue was waived. *Wofford v. Cities Serv. Oil Co.*, 236 So. 2d 743 (Miss. 1970), petition dismissed, 239 So. 2d 916 (Miss. 1970).

A defendant's plea to the merits after the overruling of her motion for a change

of venue to the county of her residence does not waive her right to the change. *Howard v. Ware*, 192 Miss. 36, 3 So. 2d 830, 140 A.L.R. 1284 (1941).

16. —Burden of proof.

A defendant seeking change of venue to

the county of her residence, notwithstanding the joinder of a codefendant against whom, it was claimed, the plaintiff had no cause of action, had the burden of negating the plaintiff's allegations in that regard. *Howard v. Ware*, 192 Miss. 36, 3 So. 2d 830, 140 A.L.R. 1284 (1941).

RESEARCH REFERENCES

ALR. Lien as estate or interest in land within venue statute. 2 A.L.R.2d 1261.

Relationship between "residence" and "domicil" under venue statutes. 12 A.L.R.2d 757.

Venue of action for cutting, destruction, or damage of standing timber. 65 A.L.R.2d 1268.

Prohibition or mandamus as appropriate remedy to review ruling on change of venue in civil case. 93 A.L.R.2d 802.

Prohibition as appropriate remedy to restrain civil action for lack of venue. 93 A.L.R.2d 882.

Venue of civil libel action against newspaper or periodical. 15 A.L.R.3d 1249.

Place where corporation is doing business for purposes of state venue statute. 42 A.L.R.5th 221.

Venue of wrongful-death action. 58 A.L.R.5th 535.

Applicability of 28 USCS § 1391(e), providing for venue and process in civil suit against federal officer or employee for official conduct, to officer or employee no longer in government service or no longer

serving government in capacity in which he acted. 48 A.L.R. Fed. 436.

What is the judicial district "in which the claim arose" for venue purposes under 28 USCS § 1391(a) and (b). 59 A.L.R. Fed. 320.

Am Jur. 77 Am. Jur. 2d, Venue §§ 32 et seq., 26, 39 et seq.

CJS. 92A C.J.S., Venue §§ 77 et seq.

Law Reviews. Symposium on Mississippi Rules of Civil Procedure: Pretrial Procedure, Applicability of Rules, and Jurisdiction and Venue — Rules 16, 81 and 82. 52 Miss. L. J. 105, March 1982.

Abbott, Venue of transitory actions against resident individual citizens in Mississippi — Statutory revision could remove needless complexity. 58 Miss. L. J. 1, Spring, 1988.

1984 Mississippi Supreme Court Review: Civil Procedure. 55 Miss. L. J. 49, March, 1985.

Practice References. 4 Am Law Prod Liab 3d, Venue; Forum Non Conveniens § 49:1.

§§ 11-11-5 and 11-11-7. Repealed.

Repealed by Laws, 2002, 3rd Ex. Sess., ch. 4, § 2, eff from and after passage (approved January 1, 2003).

11-11-5. [Codes, 1871, § 2410; 1880, § 1499; 1892, § 651; Laws, 1906, 708; Hemingway's 1917, § 487; Laws, 1930, § 496; Laws, 1942, § 1434; Laws, 1926, ch. 148; Laws, 1930, ch. 121; Laws, 1979, ch. 319, § 1; Laws, 1992, ch. 301, § 1, eff from and after July 1, 1992, and applicable only to causes of action accruing on or after July 1, 1992.]

11-11-7. [Codes, 1871, § 2410; 1880, § 1500; 1892, § 652; Laws, 1906, § 709; Hemingway's 1917, § 488; Laws, 1930, § 497; Laws, 1942, § 1435; Laws, 1916, ch. 201; Laws, 1971, ch. 349, § 1, eff from and after passage (approved March 12, 1971).]

Editor's Note — Former § 11-11-5 set rule on venue for actions against railroad and other companies.

Former § 11-11-7 regulated actions against insurance companies.

§ 11-11-9. Actions against executors.

Executors, administrators or guardians, appointed in this state and residing out of it, may be sued in the county of their appointment and may be made parties to such suit so as to authorize judgment against them by publication of summons made as provided for in the case of absent and nonresident defendants.

Actions against resident executors, administrators or guardians may be brought in the county or judicial district of their appointment.

SOURCES: Codes, 1880, § 1520; 1892, § 653; Laws, 1906, § 710; Hemingway's 1917, § 489; Laws, 1930, § 498; Laws, 1942, § 1436; Laws, 1971, ch. 486, § 1, eff from and after passage (approved March 31, 1971).

Cross References — Venue, see Miss. R. Civ. P. 82.

JUDICIAL DECISIONS

1. In general.

This section [Code 1942, § 1436] applies where a nonresident executor, administrator, or guardian has to be sum-

moned by publication. A suit will lie in any county where service of process may be had. *Williams v. Stewart*, 79 Miss. 46, 30 So. 1 (1901).

RESEARCH REFERENCES

ALR. Place of personal representative's appointment as venue of action against him in his official capacity. 93 A.L.R.2d 1199.

Capacity of guardian to sue or to be

sued outside state where appointed. 94 A.L.R.2d 162.

Am Jur. 77 Am. Jur. 2d, Venue § 15.

CJS. 92A C.J.S., Venue § 56.

§§ 11-11-11 and 11-11-13. Repealed.

Repealed by Laws, 2002, 3rd Ex. Sess., ch. 4, § 2, eff from and after passage (approved January 1, 2003).

§ 11-11-11. [Codes, 1942, § 1437; Laws, 1940, ch. 246; Laws, 1964, ch. 320, § 1; Laws, 1968, ch. 330, § 1; Laws, 1971, ch. 431, § 1, eff from and after passage (approved March 24, 1971).]

§ 11-11-13. [Codes, 1942, § 9352-61; Laws, 1938, chs. 148, 345; Laws, 1946, ch. 266, § 61; Laws, 1952, ch. 265, § 1; Laws, 1954, ch. 299, §§ 1, 2; Laws, 1958, ch. 262; Laws, 1964, ch. 376, §§ 1-4, eff from and after passage (approved April 22, 1964).]

Editor's Note — Former § 11-11-11 regulated venue selection in actions for damages against nonresidents.

Former § 11-11-13 regulated venue selection in actions for damages against nonresident motorists.

§ 11-11-15. Actions against State Board of Health or State Board of Medical Licensure.

The venue of actions against the Mississippi State Board of Health wherein said board is a defendant, or the State Board of Medical Licensure wherein said board is a defendant, shall be in Hinds County.

SOURCES: Codes, 1942, § 7096-01; Laws, 1946, ch. 483, § 1; Laws, 1980, ch. 458, § 32, eff from and after July 1, 1980.

Cross References — State board of medical licensure, see §§ 73-43-1 et seq. Venue, see Miss. R. Civ. P. 82.

§ 11-11-17. Where court has jurisdiction of subject matter but not venue.

Where an action is brought in any justice court of this state, of which the court in which it is brought has jurisdiction of the subject matter, but lacks venue jurisdiction, such action shall not be dismissed because of such lack of proper venue, but on objection on the part of the defendant shall, by the court, be transferred, together with all prepaid costs remaining after the court in which the action was originally brought has deducted the costs incurred in that court, to the venue to which it belongs.

SOURCES: Codes, 1942, § 1441; Laws, 1940, ch. 233; Laws, 1981, ch. 471, § 3; Laws, 1982, ch. 423, § 3; Laws, 1989, ch. 404, § 1; Laws, 1991, ch. 573, § 23, eff from and after July 1, 1991.

Cross References — Civil jurisdiction of justice courts, see § 9-11-9.

Proper venue of civil actions in circuit court and transferred to proper venue, see § 11-11-3.

Jurisdiction of crimes generally, see § 99-11-1.

Venue of criminal offenses, see § 99-11-3.

Criminal jurisdiction of justice courts, see § 99-33-1.

Venue, see Miss. R. Civ. P. 82.

Rule governing change of venue, see Miss. R. Civ. P. 82.

JUDICIAL DECISIONS**1. In general.**

This is a general statute without application to the statutes on the special or particular subject of divorce. *Stark v. Stark*, 755 So. 2d 31 (Miss. Ct. App. 1999); *Price v. Price*, 202 Miss. 268, 32 So. 2d 124 (1947); *Cruse v. Cruse*, 202 Miss. 497, 32 So. 2d 355 (1947).

The chancery court of Hinds County should have transferred a separate maintenance suit to the Rankin County chancery court, even though the defendant was temporarily residing in Hinds County where he was found for the service of

process, where the defendant owned a home in Rankin County which he still considered to be his residence, he was registered to vote and did vote in Rankin County, and he had a homestead exemption on a home in Rankin County; the mere fact that the defendant was not actually present in his home did not mean that it was not his residence. *Dunn v. Dunn*, 577 So. 2d 378 (Miss. 1991).

This section [Code 1942, § 1441] applies only where the trial court lacks venue jurisdiction; and does not require a change of venue to the county of the non-

resident defendant upon dismissal of the suit, after a settlement, as against the resident defendant. *New Biloxi Hosp. v. Frazier*, 245 Miss. 185, 146 So. 2d 882 (1962).

A suit for alimony pendente lite, separate maintenance, and attorneys' fees which was brought in Tate County, the residence of the wife, should have been transferred to the chancery court of Alcorn County, where the evidence established that the latter county was the residence of the husband and the husband had made timely objection to the venue. *Trainum v. Trainum*, 234 Miss. 448, 105 So. 2d 628 (1958).

Where defendant in a replevin action not only submitted the jurisdiction of the

court by participating in the trial, but also invoked the jurisdiction of the court by filing a counterclaim for damages, this constituted a waiver of any objection to the venue. *King v. Ainsworth*, 225 Miss. 248, 83 So. 2d 97 (1955).

A mandamus action by a county to compel the state highway commission to appraise and reimburse such county its proportionate value of a bridge constructed by Hancock and Harrison counties, which had been taken over by the highway commission and made a part of United States Highway 90, was properly transferred to Hinds County, in which the commission had its permanent office. *State ex rel. Cowan v. State Hwy. Comm'n*, 195 Miss. 657, 13 So. 2d 614 (1943).

ATTORNEY GENERAL OPINIONS

An individual may be instructed prior to filing an action that the county justice court might lack proper jurisdiction, but if the plaintiff still persists in filing the action in that court, the clerk should file the action and collect the proper fees; the justice court judge may, prior to issuing a

summons, order the case dismissed for lack of jurisdiction and, in such a case, the plaintiff would not be entitled to his filing fee but would be entitled to refund of the constable's fee. *Shirley*, Nov. 16, 2001, A.G. Op. #01-0697.

RESEARCH REFERENCES

Am Jur. 77 Am. Jur. 2d, Venue § 67.

Stipulation for action*to be transferred to another county, 24 Am. Jur. Pl & Pr Forms (Rev), Venue, Form 222.

20 Am. Jur. Pl & Pr Forms, Venue, Form 20:1272 (Stipulation for action to be transferred to proper county).

CJS. 92 C.J.S., Venue §§ 147, 148, 150-198.

Law Reviews. 1985 Mississippi Supreme Court Review — Civil Procedure. 55 Miss. L. J. 755, December 1985.

Abbott, Venue of transitory actions against resident individual citizens in Mississippi — Statutory revision could remove needless complexity. 58 Miss. L. J. 1, Spring, 1988.

§ 11-11-19. Where brought if judge interested.

If the judge of the court be a party to or interested in any suit about to be commenced, the suit may be instituted in an adjacent district, and the process may be issued to and served in any county where the defendant may be found; or the suit may be brought as if the judge were not a party to or interested in it.

SOURCES: Codes, Hutchinson's 1848, ch. 58, art. 1 (173); 1857, ch. 61, art. 34; 1871, § 524; 1880, § 1501; 1892, § 654; Laws, 1906, § 711; Hemingway's 1917, § 490; Laws, 1930, § 499; Laws, 1942, § 1442.

Cross References — When judge must not preside on trial of cause, see § 9-1-11. Venue, see Miss. R. Civ. P. 82.

RESEARCH REFERENCES

ALR. Judge's previous legal association with attorney connected to current case as warranting disqualification. 85 A.L.R.4th 700.

Am Jur. 77 Am. Jur. 2d, Venue § 65.
CJS. 92 C.J.S., Venue §§ 174-183.

CHANGE OF VENUE

SEC.

- 11-11-51. Grounds for change of venue, generally.
- 11-11-53. Transmission of papers.
- 11-11-55. Receipt of papers and entry of cause.
- 11-11-57. Venue changed but once.
- 11-11-59. Applicability of provisions to districts in county.

§ 11-11-51. Grounds for change of venue, generally.

When either party to any civil action in the circuit court shall desire to change the venue, he shall present to the court, or the judge of the district, a petition setting forth under oath that he has good reason to believe, and does believe that, from the undue influence of the adverse party, prejudice existing in the public mind, or for some other sufficient cause to be stated in the petition, he cannot obtain a fair and impartial trial in the county where the action is pending, and that the application is made as soon as convenient after being advised of such undue influence, prejudice, or other cause, and not to delay the trial or to vex or harass the adverse party. On reasonable notice in writing to the adverse party of the time and place of making the application, if made in vacation, the court, if in term time, or the judge in vacation, shall hear the parties and examine the evidence which either may adduce, and may award a change of venue to some convenient county where an impartial trial may be had, and, if practicable, in which the circuit court may next be held. If made in vacation, the order shall be indorsed on the petition and directed to the clerk, who shall file the same with the papers in the suit.

SOURCES: Codes, Hutchinson's 1848, ch. 59, art. 2 (1); 1857, ch. 61, art. 122; 1871, § 719; 1880, § 1502; 1892, § 655; Laws, 1906, § 712; Hemingway's 1917, § 491; Laws, 1930, § 500; Laws, 1942, § 1443.

Cross References — Change of venue in jury cases in chancery court practice, see § 11-5-5.
Change of venue of garnishment proceedings, see § 11-35-49.
Change of venue in criminal prosecutions, see § 99-15-35.
Venue, see Miss. R. Civ. P. 82.

JUDICIAL DECISIONS

- 1. In general.
- 2. Power and duty of court.
- 3. Specific grounds.
- 4. —Prejudice.

5. —Consent.
6. Forum non conveniens.
7. Other grounds.

1. In general.

Petition for change of venue was not required to be signed by corporate defendant; signature of defendant's attorney was sufficient. *Beech v. Leaf River Forest Prods., Inc.*, 691 So. 2d 446 (Miss. 1997).

Circuit Court acted within its lawful discretion in denying railroad's motion for change of venue; § 11-11-5 establishes that venue is proper in county in which plaintiff resides, and that was county where venue was set; grounds that railroad could not obtain fair trial in county where venue was set was rejected where railroad failed to show undue influence of adverse party or prejudice existing in public mind or some other reason. *Maxwell v. Illinois Cent. G.R.R.*, 513 So. 2d 901 (Miss. 1987).

The purpose of this section [Code 1942, § 1443] is to guarantee the litigant's rights to a fair trial. *Mississippi State Hwy. Comm'n v. Rogers*, 240 Miss. 529, 128 So. 2d 353 (1961).

Change of venue statute was intended to provide method by which fair and impartial trial could be obtained whenever on account of undue influence of adverse party, prejudice in public mind, or other sufficient cause, a fair and impartial trial could not be obtained in county in which venue was originally fixed. *Tucker v. Gurley*, 176 Miss. 708, 170 So. 230 (1936).

Where a county is the defendant, this section [Code 1942, § 1443] equally applies. *Humphreys County v. Cashin*, 128 Miss. 236, 90 So. 888 (1922).

The statute applies only to civil actions begun by ordinary summons and not to attachments. *Baum v. Burnes*, 66 Miss. 124, 5 So. 697 (1888).

An affidavit for a change of venue is not a part of the record unless made so by bill of exceptions. *Grant v. Planters' Bank*, 5 Miss. (4 Howard) 326 (1840).

2. Power and duty of court.

Application for change of venue is addressed to discretion of trial judge, and ruling thereon will not be disturbed on appeal unless it clearly appears that there has been abuse of discretion or that dis-

cretion has not been justly and properly exercised under circumstances of case. *Beech v. Leaf River Forest Prods., Inc.*, 691 So. 2d 446 (Miss. 1997).

Change of venue motion was timely even though it was filed nearly two years after commencement of action, where motion was filed three months before trial and was based in part on pretrial publicity. *Beech v. Leaf River Forest Prods., Inc.*, 691 So. 2d 446 (Miss. 1997).

An application for change of venue is addressed to the discretion of the trial judge, and his ruling thereon will not be disturbed on appeal save for abuse of or failure to properly exercise discretion. *Mississippi State Hwy. Comm'n v. Rogers*, 240 Miss. 529, 128 So. 2d 353 (1961).

Court should grant change of venue whenever conditions arise which, by virtue of change of venue statute, authorize change of venue. *Tucker v. Gurley*, 176 Miss. 708, 170 So. 230 (1936).

Where there is testimony supporting the judgment of the court ordering a change of venue he may grant such change. *Belzoni Hardwood Co. v. Cinquimani*, 137 Miss. 72, 102 So. 470 (1924).

On an application for a change of venue in term-time, an order of court is necessary. *Saunders v. Morse*, 4 Miss. (3 Howard) 101 (1838).

3. Specific grounds.

4. —Prejudice.

Paper mill presented sufficient evidence in form of affidavits, depositions, newspaper articles, videotapes of news stories, and other exhibits to support petition for change of venue on basis of excessive pretrial publicity and citizen bias created by large number of potential jurors involved in similar dioxin-related litigation against mill. *Beech v. Leaf River Forest Prods., Inc.*, 691 So. 2d 446 (Miss. 1997).

The Highway Commission is entitled to a change in the venue of a proceeding to condemn property for highway purposes where two previous jury verdicts in the case, and verdicts in other cases in the county, had been set aside as excessive. *Mississippi State Hwy. Comm'n v. Rogers*, 240 Miss. 529, 128 So. 2d 353 (1961).

Change of venue of action for wrongful killing by deputy sheriffs, to county other than county of deputy sheriffs' residence, held not error. *Tucker v. Gurley*, 176 Miss. 708, 170 So. 230 (1936).

5. —Consent.

6. Forum non conveniens.

The application of intrastate forum non conveniens is invalid where the trial court is faced with a choice of venue between two Mississippi counties. *Salts v. Gulf Nat'l Life Ins. Co.*, 743 So. 2d 371 (Miss. 1999), appeal dismissed, 849 So. 2d 848 (Miss. 2002).

7. Other grounds.

In an action for malicious damage to a

physician's reputation, the defendant medical center and radiology clinic were not entitled to a change of venue to the county in which they were located where they argued that medical care in the county in which they were located would be crippled if they were forced to defend in county in which the plaintiff commenced the action and that they would be required to incur higher costs of obtaining the attendance of unwilling witnesses to testify since they failed to show bias under the statute and failed to prove that the plaintiff's choice of venue would have denied them a fair and impartial trial. *Pisharodi v. Golden Triangle Regional Medical Ctr.*, 735 So. 2d 353 (Miss. 1999).

RESEARCH REFERENCES

ALR. Prohibition or mandamus as appropriate remedy to review ruling on change of venue in civil case. 93 A.L.R.2d 802.

Prohibition as appropriate remedy to restrain civil action for lack of venue. 93 A.L.R.2d 882.

Choice of venue to which transfer is to be had, where change is sought because of local prejudice. 50 A.L.R.3d 760.

Change of venue as justified by fact that large number of inhabitants of local jurisdiction have interest adverse to party to state civil action. 10 A.L.R.4th 1046.

Construction and application of venue provisions of Miller Act (40 USCS § 270b(b)). 140 A.L.R. Fed. 615.

Am Jur. 77 Am. Jur. 2d, Venue §§ 62, 63, 74 et seq.

24 Am. Jur. Pl & Pr Forms (Rev), Venue Forms 251-257 (Change of venue to pro-

mote the convenience of witnesses and ends of justice).

24 Am. Jur. Pl & Pr Forms (Rev), Venue, Forms 241, 242 (Change of venue on grounds of disqualification, bias, or prejudice of trial judge).

24A Am. Jur. Pl & Pr Forms (Rev), Venue, Form 291.2 (Motion-For change of venue-To county where real property subject to litigation is located).

24 Am. Jur. Pl & Pr Forms (Rev), Venue, Forms 231-234 (Change of venue on grounds of inability to obtain fair trial).

20 Am. Jur. Pl & Pr Forms, Venue, Forms 20:1211-20:1224 (Demand for and notice of motion for change of venue).

3 Am. Jur. Trials, Selecting the Forum-Defendant's Position, §§ 19, 20.

CJS. 92 C.J.S., Venue §§ 184-194, 223, 228, 232, 235.

§ 11-11-53. Transmission of papers.

(1) When an order for a change of venue shall be made, the clerk shall make out a descriptive list of all the papers in the cause and a certified copy of all orders and judgments made therein, with their dates, and a bill of the costs that have accrued. The said clerk shall carefully and safely put all the papers, with a copy of the descriptive list, and a copy of the orders and judgments, and the bill of costs, into a package, to be well covered and sealed up, and directed to the clerk of the court in which the suit is ordered removed. The clerk shall, if not otherwise directed by the judge, take the receipt of the party obtaining the change of venue for the papers contained on said list, and deliver the

package to said party, to be carried to the clerk of the court to whom it may be directed, or it may be sent by mail, postage paid, or by express, the clerk taking proper receipt therefor.

(2) In Harrison County, a county having two judicial districts, in all civil proceedings, or matters, where the venue thereof shall be changed, or the trial transferred or removed from one district to the other, the original papers, together with certified copies of all motions, orders and decrees made and entered in such suits, proceedings, matters and cases, shall be transmitted, transferred and filed by the proper clerk to and in his office at the proper place to which such change of venue or transfer shall be made.

SOURCES: Codes, Hutchinson's 1848, ch. 59, art. 2 (4); 1857, ch. 61, art. 123; 1871, § 720; 1880, § 1503; 1892, § 656; Laws, 1906, § 713; Hemingway's 1917, § 492; Laws, 1930, § 501; Laws, 1942, §§ 1444, 2910-18; Laws, 1962, ch. 257, § 18, eff from and after passage (approved June 1, 1962).

Cross References — Another section derived from same 1942 code section, see § 99-11-39.

Transmission of papers and the like following an order changing the venue in a criminal case, see § 99-15-37.

Venue, see Miss. R. Civ. P. 82.

RESEARCH REFERENCES

ALR. Choice of venue to which transfer is to be had, where change is sought because of local prejudice. 50 A.L.R.3d 760.

Am Jur. 77 Am. Jur. 2d, Venue § 92.
CJS. 92 C.J.S., Venue §§ 284, 292, 300.

§ 11-11-55. Receipt of papers and entry of cause.

The clerk to whom the papers may be transmitted shall open the package and compare the papers with the descriptive list, and shall give the person delivering the same, if demanded, a receipt therefor. He shall then enter the cause on his docket as if it had been commenced in the court of which he is clerk, and issue subpoena for witnesses as in other cases.

SOURCES: Codes, Hutchinson's 1848, ch. 59, art. 2 (5); 1857, ch. 61, art. 124; 1871, § 721; 1880, § 1504; 1892, § 657; Laws, 1906, § 714; Hemingway's 1917, § 493; Laws, 1930, § 502; Laws, 1942, § 1445.

Cross References — Venue, see Miss. R. Civ. P. 82.

JUDICIAL DECISIONS

1. In general.

Where action, brought in wrong county, was transferred to the proper county, the clerk of court of the latter county was without the right to refuse to docket the cause until security for costs had been given, where plaintiff was not a nonresi-

dent and was not shown to be insolvent, the clerk's right to obtain security for cost in such case being limited to that prescribed as to suit already commenced. *Neely v. Martin*, 193 Miss. 856, 11 So. 2d 435 (1943).

RESEARCH REFERENCES

ALR. Choice of venue to which transfer is to be had, where change is sought because of local prejudice. 50 A.L.R.3d 760.

Am Jur. 77 Am. Jur. 2d, Venue § 92.
CJS. 92 C.J.S., Venue §§ 284, 292, 300.

§ 11-11-57. Venue changed but once.

A civil suit shall not be removed more than once, or in any other manner than as prescribed, and in no case where it shall appear that there has been unnecessary delay or negligence in making the application.

SOURCES: Codes, Hutchinson's 1848, ch. 59, art. 2 (6); 1857, ch. 61, art. 125; 1871, § 722; 1880, § 1505; 1892, § 658; Laws, 1906, § 715; Hemingway's 1917, § 494; Laws, 1930, § 503; Laws, 1942, § 1446.

Cross References — Venue, see Miss. R. Civ. P. 82.

RESEARCH REFERENCES

ALR. Choice of venue to which transfer is to be had, where change is sought because of local prejudice. 50 A.L.R.3d 760.

federal district court begin to run under 28 USCS § 1446(b). 139 A.L.R. Fed. 331.

Am Jur. 77 Am. Jur. 2d, Venue § 53.

CJS. 92 C.J.S., Venue §§ 158, 283, 302 et seq.

§ 11-11-59. Applicability of provisions to districts in county.

The provisions for a change of venue shall be applied in those counties where there are two places of holding circuit courts in the same manner as if each district were a separate county.

SOURCES: Codes, 1871, § 723; 1880, § 1506; 1892, § 659; Laws, 1906, § 716; Hemingway's 1917, § 495; Laws, 1930, § 504; Laws, 1942, § 1447.

Cross References — Venue, see Miss. R. Civ. P. 82.

RESEARCH REFERENCES

ALR. Choice of venue to which transfer is to be had, where change is sought

because of local prejudice. 50 A.L.R.3d 760.

CHAPTER 13

Injunctions

SEC.

- 11-13-1. Evidence of complainant's equity and of truth of allegations required.
- 11-13-3. Security required to stay proceedings at law.
- 11-13-5. Bond when injunction is not to stay proceedings at law.
- 11-13-7. Bonds in particular cases.
- 11-13-9. Bond not required of state, county, municipality.
- 11-13-11. Restraint on collection of taxes.
- 11-13-13. Security required to enjoin collection of taxes.
- 11-13-15. Procedure for injunction of the collection of taxes.
- 11-13-17. Dissolution or modification of injunction of tax collection; general powers.
- 11-13-19. Chancellor may order return of personal property; execution.
- 11-13-21. Return of personal property; other causes.
- 11-13-23 through 11-13-29. Repealed.
- 11-13-31. Motion to dissolve injunction; affidavits; evidence.
- 11-13-33. Injunction bond as judgment.
- 11-13-35. Damages on dissolution of certain injunctions.
- 11-13-37. Post-injunction damages.
- 11-13-39. Effect of dissolution of injunction on bill of complaint.

§ 11-13-1. Evidence of complainant's equity and of truth of allegations required.

An injunction shall not be granted unless the judge or chancellor shall be satisfied of the complainant's equity and of the truth of the allegations of the bill, by oath or other means.

SOURCES: Codes, 1857, ch. 62, art. 64; 1871, § 1043; 1880, § 1903; 1892, § 557; Laws, 1906, § 608; Hemingway's 1917, § 368; Laws, 1930, § 415; Laws, 1942, § 1335.

Cross References — Power of courts to grant injunctions, see § 9-1-19.

Authority of the court to punish for violation of injunction, see § 9-5-87.

Injunction to prohibit the selling of tobacco, see § 27-69-61.

Injunction to prohibit the operation of a rendering plant, see § 41-51-33.

Injunction to prohibit unlicensed practice of profession, see §§ 73-51-1, 73-51-3, 73-51-5.

Restraining wrongful disposition of collateral by secured party under Uniform Commercial Code, see § 75-9-507.

Injunction for violation of weights and measures law of 1964, see § 75-27-61.

Injunction against certain violations of the business tender offer law, see § 75-72-119.

Injunctive remedy for violations relating to legal expense insurance plans, see § 83-49-31.

Injunctions, see Miss. R. Civ. P. 65.

Rule governing the procedure for injunctions, see Miss. R. Civ. P. 65.

JUDICIAL DECISIONS

1. Right to and propriety of injunction in general.
2. —Existence and adequacy of other remedies.
3. —Irreparable injury.
4. —Multiplicity of suits.
5. —Laches.
6. Mandatory injunction.
7. Temporary injunction.
8. Restraining order.
9. Persons entitled to relief.
10. Subjects of injunctive relief.
11. —Property rights.
12. —Elections.
13. —Nuisances.
14. —Taxes.
15. —Criminal prosecutions.
16. —Miscellaneous.
17. Pleading.
18. Judgment or decree.

1. Right to and propriety of injunction in general.

State court may prevent resident under its jurisdiction from doing inequity by maintaining federal court suit in distant jurisdiction when convenient and suitable forum is at resident's doorstep if matter of venue is not covered by act of Congress. *Poole v. Mississippi Publishers Corp.*, 208 Miss. 364, 44 So. 2d 467 (1950).

Neither Norris-LaGuardia Act, 29 USCS § 101, nor National Labor Relations Act, 29 USCS § 151, prohibits institution by employer involved in labor dispute of proceeding in state court for injunction against unlawful acts of labor unions and their members. *Southern Bus Lines v. Amalgamated Ass'n of St., Elec. Ry. & Motor Coach*, 205 Miss. 354, 38 So. 2d 765 (1949).

Sureties on tenant's replevin bond cannot enjoin judgment thereon in landlord's favor, where they have acquired the agricultural products subject to landlord's claim for rent and make no offer to pay him, even if the judgment be void, as "he who seeks equity must do equity." *Walker-Durr Co. v. Mitchell*, 97 Miss. 231, 52 So. 583 (1910).

Rights already lost and wrongs already committed cannot be enjoined. *McDaniel v. Hurt*, 92 Miss. 197, 41 So. 381 (1906).

One seeking relief by injunction against a judgment at law rendered without notice, must show not only that the judgment was void but that he has a good defense to the suit. *Newman v. Taylor*, 69 Miss. 670, 13 So. 831 (1892).

2. —Existence and adequacy of other remedies.

Inadequacy of the remedy at law is the basis upon which the power of injunction is exercised; an injunction will not issue when the complainants have a complete and adequate remedy by appeal. Thus, a county supervisor's request for injunctive relief from the board of supervisor's ruling that the county supervisor was no longer a resident of the electing district and declaring the office vacant, was properly denied since the statutory method of appeal to the circuit court under § 11-51-75 afforded the county supervisor a plain, adequate, speedy, and complete remedy for a judicial determination of his right. *Moore v. Sanders*, 558 So. 2d 1383 (Miss. 1990).

In an action to enjoin the use of defendant's house as a beauty parlor, allegedly in violation of a protective covenant, it was no defense that the plaintiffs had not exhausted their administrative remedies in that they had not followed their prior objection to the defendant's successful application to the county board of supervisors for a use permit to its ultimate disposition, since the litigation arose from personal rights derived from a protective covenant, and a county board of supervisors is without authority, by the issuance of a use permit, to change or alter a solemn personal contract with regard to the use of land. *Sullivan v. McCallum*, 231 So. 2d 801 (Miss. 1970).

Bill for injunction to restrain retailers from selling products of complainant below prices fixed by complainant, as manufacturer of such products, in its trade contracts entered into with certain local retail dealers in conformity with provisions of § 1108, Code of 1942, known as "Fair Trade Act," which contains all essential averments to entitle complainant to benefit of provisions of that act and to enforcement of its trade contracts, and

also discloses that action at law for damages would not afford as plain, adequate or complete a relief as would be afforded by injunctive relief, states good cause of action for injunctive relief. *W.A. Sheaffer Pen Co. v. Barrett*, 209 Miss. 1, 45 So. 2d 838 (1950).

Fact that acts against which injunction is sought are punishable criminally does not constitute adequate remedy so as to bar equitable relief, although equitable action is never predicated on prevention of crime. *Southern Bus Lines v. Amalgamated Ass'n of St., Elec. Ry. & Motor Coach*, 205 Miss. 354, 38 So. 2d 765 (1949).

Bill to enjoin appeal from tax assessment not maintainable if remedy is defensive merely and equally available at law. *Edward Hines Yellow Pine Trustees v. Knox*, 144 Miss. 560, 108 So. 907 (1926).

Validity of appeal from tax assessment may be determined in proceeding at law and is not ground for injunction. *Edward Hines Yellow Pine Trustees v. Knox*, 144 Miss. 560, 108 So. 907 (1926).

Mere fact that defense to appeal from tax assessment will entail expense not ground for injunction. *Edward Hines Yellow Pine Trustees v. Knox*, 144 Miss. 560, 108 So. 907 (1926).

Creditor's bill attacking conveyance as fraudulent and for amount due cannot be enjoined by subsequent action where rights of defendant in original action can be fully protected by cross-bill. *Grenada Bank v. Waring*, 135 Miss. 226, 99 So. 681 (1924).

Defendant sued at law and having only legal defense must make his defense at law. *International Harvester Co. of Am. v. V.P. Still & Son*, 98 Miss. 127, 53 So. 394 (1910).

Judgment creditor cannot be enjoined from garnishing wages of debtor, though the same are exempt and debtor's employer has rule that employees will be discharged if their wages are garnished. *Sturges v. Jackson*, 88 Miss. 508, 40 So. 547, 117 Am. St. R. 754 (1906).

Debtor whose wages are exempt, having adequate remedy at law on indemnity bond given sheriff or sheriff's official bond, cannot enjoin garnishment proceedings. *Sturges v. Jackson*, 88 Miss. 508, 40 So. 547, 117 Am. St. R. 754 (1906).

Suit to enjoin will not lie where ground is available in defense of the action. *Larson v. Larson*, 82 Miss. 116, 33 So. 717 (1903); *International Harvester Co. v. V.P. Still & Son*, 98 Miss. 127, 53 So. 394 (1910).

An injunction will not be granted against a judgment at law where relief can be had by petition to the circuit court for a supersedeas of the execution. *Ricks v. Richardson*, 70 Miss. 424, 11 So. 935 (1892).

3. —Irreparable injury.

The chancery court had full authority to grant injunctive relief wholly absent any showing of irreparable harm where a developer had ignored a county subdivision ordinance. Implicit in land use regulations enacted for the benefit of the public is that substantial violations, per se, cause irreparable harm. *Johnson v. Hinds County*, 524 So. 2d 947 (Miss. 1988).

Right to injunctive relief is basic ground of jurisdiction of court of equity, particularly when it comes to enjoining repeated and continuing trespass to property, where actions at law would entail multiplicity of suits, and where damages would be irreparable. *Southern Bus Lines v. Amalgamated Ass'n of St., Elec. Ry. & Motor Coach*, 205 Miss. 354, 38 So. 2d 765 (1949).

Injunction not granted on ex parte application without notice except in cases of greatest emergency and to prevent irreparable injury. *Glover v. Falls*, 120 Miss. 201, 82 So. 4 (1919).

Taxpayers objecting to submission of legislative act to referendum on the ground of invalidity of referendum law do not suffer irreparable injury entitling them to an injunction. *Power v. Ratliff*, 112 Miss. 88, 72 So. 864, Am. Ann. Cas. 1918E, 1446 (1916).

4. —Multiplicity of suits.

Right to injunctive relief is basic ground of jurisdiction of court of equity, particularly when it comes to enjoining repeated and continuing trespass to property, where actions at law would entail multiplicity of suits, and where damages would be irreparable. *Southern Bus Lines v. Amalgamated Ass'n of St., Elec. Ry. &*

Motor Coach, 205 Miss. 354, 38 So. 2d 765 (1949).

Equity may interfere to prevent multiplicity of suits where injury is continuing in effect. *Cumberland Tel. & Tel. Co. v. Williamson*, 101 Miss. 1, 57 So. 559 (1912).

Bill to prevent multiplicity of suits does not lie unless same legal questions and practically the same facts are involved, and complainant has good legal or equitable defense to them. *Gulf Compress Co. v. Wooten Cotton Co.*, 98 Miss. 651, 54 So. 86 (1911).

Where defendant in ejectment has equitable defense he may enjoin its prosecution, and his legal defenses may be set up in equity, thus preventing a multiplicity of suits. *Butler v. Scottish-American Mtg. Co.*, 93 Miss. 215, 46 So. 829 (1908).

A number of plaintiffs separately suing the same defendant in actions of trespass, the defendant's liability depending upon the same facts, and the act complained of being a constantly recurring one, may be enjoined and their cases consolidated to prevent a multiplicity of suits. *Illinois Cent. R.R. v. Garrison*, 81 Miss. 257, 32 So. 996, 95 Am. St. R. 469 (1902).

Separate actions to recover damages against the complainant where the plaintiffs have no common interest except in the questions of law and facts involved, and where they could not be proceeded against by complainant separately, will not be enjoined. *Tribbette v. Illinois Cent. R.R.*, 70 Miss. 182, 12 So. 32, 35 Am. St. R. 642 (1892).

5. —Laches.

In an action to enjoin the use of a house as a beauty parlor, allegedly in violation of a protective covenant, where the defendant had gained financial benefit from such use of her house for six years prior to the commencement of the suit, she was not entitled to invoke the doctrine of laches since a fundamental rule of the doctrine of laches is that the person who seeks to invoke it must first establish that the delay has resulted to his injury and that it would be inequitable to sustain the suit. *Sullivan v. McCallum*, 231 So. 2d 801 (Miss. 1970).

An injunction against use of premises as a tea room and gift shop, contrary to a

restriction against commercial use in the proprietor's and her previous lessor's deed, was properly denied where the proprietor had, without objection from any owners of other lots in the addition, conducted such business on the premises as a lessee for six years before purchasing the property. *Twin States Realty Co. v. Kilpatrick*, 199 Miss. 545, 26 So. 2d 356 (1946).

Complainant barred by laches from restraining defendant using its name, emblem, and insignia. *Supreme Lodge K.P. v. Knights of Pythias*, 102 Miss. 280, 59 So. 88 (1912).

6. Mandatory injunction.

A mandatory injunction must be specific and spell out exactly what the parties are to do or refrain from doing. *Johnson v. Hinds County*, 524 So. 2d 947 (Miss. 1988).

Where the complainants, whose home was on the lot adjoining the defendants' lot, charged that the defendants violated front set-back line restrictions by approximately 20 feet in the construction of a home, but had failed to object to the violation during construction until the foundation slab had been poured and the house had been roughed in, and failed to show such great damage or irreparable injury as to require the issuance of a mandatory injunction, the court's failure to grant a request for a mandatory injunction, requiring instead that complainants accept damages in lieu of injunction, was not an abuse of discretion, the mandatory injunction being an extraordinary remedial process which will not be issued in doubtful cases. *Pattillo v. Bridges*, 247 So. 2d 811 (Miss. 1971).

Mandatory injunction compelling plaintiff's reinstatement in credit union and retention of his deposit was granted where bylaw amendment permitting expulsion when depositor ceases to be an employee was invalid, because no quorum was present and articles permitted expulsion only for cause, notwithstanding withdrawal from defendant's employment. *Hall v. Ingalls Employees Credit Union*, 206 Miss. 104, 39 So. 2d 774 (1949).

Mandatory injunction should not be granted without notice unless of unquestionable propriety. *Pearman v. Wiggins*, 103 Miss. 4, 60 So. 1 (1912); *Montgomery*

v. Hollingsworth, 127 Miss. 346, 90 So. 79 (1921).

Mandatory injunction will lie to require creditor who owned a judgment and a trust deed covering exempt and nonexempt property of his debtor to first exhaust the nonexempt property before resorting to exempt property. *Hays v. Barlow*, 98 Miss. 487, 54 So. 2, Am. Ann. Cas. 1913B,394 (1911).

A mandatory injunction should not be granted unless there be no reasonable doubt of its propriety, and it is safer to first hear both sides. *Gulf Coast Ice Mfg. Co. v. Bowers*, 80 Miss. 570, 32 So. 113 (1902).

7. Temporary injunction.

The circumstances in which a preliminary injunction may be granted are not prescribed by the Rules of Civil Procedure, but remain a matter of the trial court's discretion, exercised in conformity with traditional equity practice. Under the traditional practice, the plaintiff bears the burden of showing the prerequisites for obtaining the extraordinary relief of preliminary injunction. *Moore v. Sanders*, 558 So. 2d 1383 (Miss. 1990).

Where there exists a serious emergency situation which threatens irreparable injury, the issuance of a preliminary prohibitive injunction without a hearing and without notice to the party against whom relief is sought may be proper. *Lance v. Mississippi Emp. Sec. Comm'n*, 279 So. 2d 622 (Miss. 1973).

Temporary injunction may be granted ex parte without notice in cases of greatest emergency. *Alexander v. Woods*, 103 Miss. 869, 60 So. 1017 (1913).

Temporary injunction should be granted only to prevent irreparable injury. *Mayor of Water Valley v. State*, 103 Miss. 645, 60 So. 576 (1913).

8. Restraining order.

Restraining order unknown to the practice in this state and cannot be granted upon issuance of citation to show cause why injunction should not be granted, as such citation implies that defendant may not be restrained until after hearing. *Castleman v. State*, 94 Miss. 609, 47 So. 647 (1908).

9. Persons entitled to relief.

Where the complaint showed that one other than the complainant was in possession of the office and performing the duties thereof, the complainant failed to bring himself within the exception to the general rule that an injunction will not lie to try the right and title to a public office. *Lacey v. Noblin*, 238 Miss. 329, 118 So. 2d 336 (1960).

Taxpayers not entitled to injunction against construction of overhead passway where entire costs borne by railroad and federal and state highway department. *Hinds County v. Johnson*, 133 Miss. 591, 98 So. 95 (1923).

Game warden appointed under Laws 1916 ch. 99, could not enjoin submission of the act to a referendum of the voters on the theory that he was entitled to emoluments of his office and might suffer irreparable injury. *Power v. Ratliff*, 112 Miss. 88, 72 So. 864, Am. Ann. Cas. 1918E,1446 (1916).

Owner, without objecting to petition and appealing, may on bill to enjoin issuance of bonds of established drainage districts question court's jurisdiction where such question was one of law to be determined from the record. *Hardee v. Brooks*, 107 Miss. 821, 66 So. 216 (1914).

State revenue agent cannot enjoin bank from using void order of supervisors assessing back taxes, in circuit court on appeal from order of board rejecting assessment for back taxes by tax collector, as circuit court could give adequate relief. *Adams v. First Nat'l Bank*, 103 Miss. 744, 60 So. 770 (1913).

Taxpayer may enjoin carrying out of drainage scheme under void statute. *Belzoni Drainage Comm'n v. Winn*, 98 Miss. 359, 53 So. 778 (1910).

Either party to suit involving title to land may enjoin the other from cutting timber or committing waste thereon. *Freeman v. Ammons*, 91 Miss. 672, 46 So. 61 (1908).

Justice of the peace and members of board of supervisors cannot enjoin election to determine question of creation of new county on the ground that the act providing for such election was unconstitutional, as they have no right to complain until directly affected by its operation.

Conner v. Gray, 88 Miss. 489, 41 So. 186, 9 Am. Ann. Cas. 120 (1906).

One tenant in common is entitled to an injunction against his co-tenants to restrain unusual and unreasonable waste, indicating malice and tending to destroy the chief value of the land. *Leatherbury v. McInnis*, 85 Miss. 160, 37 So. 1018, 107 Am. St. R. 274 (1905) but see *Threatt v. Rushing*, 361 So. 2d 329 (Miss. 1978).

A debtor may enjoin a sale under a deed of trust given to secure a usurious debt by paying or tendering the principal of the debt without interest. *Southern Home Bldg. & Loan Ass'n v. Tony*, 78 Miss. 916, 29 So. 825 (1901); *Purvis v. Woodward*, 78 Miss. 922, 29 So. 917 (1901); *Parchman v. McKinney*, 20 Miss. (12 S. & M.) 631 (1849); *Long v. McGregor*, 65 Miss. 70, 3 So. 240 (1887); *American Freehold Land & Mtg. Co. v. Jefferson*, 69 Miss. 770, 12 So. 464 (1892).

10. Subjects of injunctive relief.

11. —Property rights.

Injunction to prevent maintenance of embankment on defendant's land, alleged to cause more water to flow into creek, is properly denied where embankment was constructed for purpose of causing water to flow into creek as natural water course instead of overflowing defendant's field. *Jones v. Walker*, 44 So. 2d 466 (Miss. 1950).

Complainants are not entitled to injunctive relief against use of property in violation of alleged restrictive covenants when no restrictive covenants are contained in deed to owners of property in question nor in mesne conveyances by which property passed to them. *Watson v. Waldon*, 43 So. 2d 751 (Miss. 1950).

Equity will not enjoin solvent mortgagee from foreclosing his mortgage through advertisement and sale by a trustee until an accounting can be had between parties to ascertain whether or not mortgagor has counterclaim against the mortgagee, where such counterclaim has arisen out of a separate and distinct transaction from that out of which the mortgage indebtedness arose. *Hub Bldg. & Loan Ass'n v. Warren*, 207 Miss. 297, 42 So. 2d 203 (1949).

Right to injunctive relief is basic ground of jurisdiction of court of equity, particularly when it comes to enjoining repeated and continuing trespass to property, where actions at law would entail multiplicity of suits and where damages would be irreparable. *Southern Bus Lines v. Amalgamated Ass'n of St., Elec. Ry. & Motor Coach*, 205 Miss. 354, 38 So. 2d 765 (1949).

State court of equity has jurisdiction to protect certified common carrier of passengers by motor vehicle in interstate and intrastate commerce in its property rights in its large investments in state and to prevent, by injunction, through force, intimidation and violence, irreparable injury to persons and property. *Southern Bus Lines v. Amalgamated Ass'n of St., Elec. Ry. & Motor Coach*, 205 Miss. 354, 38 So. 2d 765 (1949).

Injunction will not lie to restrain prosecution of replevin to recover property by claimant not holder of warehouse receipts issued therefor. *Sunflower Compress Co. v. Staple Cotton Coop. Ass'n*, 139 Miss. 200, 103 So. 802 (1925).

Error to dismiss bill and deny relief for trespass on land in seeking private way, where it alleged that no proceeding had before board of supervisors. *Whitefort v. Homochitto Lumber Co.*, 130 Miss. 14, 93 So. 437 (1922).

Injunction against interference of property rights may be granted although defendant may be guilty of criminal trespass where such fact is mere incident to and not made basis of equitable relief. *Floyd v. Adler*, 96 Miss. 544, 51 So. 897 (1910).

Either party to suit involving title to land may enjoin the other from cutting timber or committing waste thereon. *Freeman v. Ammons*, 91 Miss. 672, 46 So. 61 (1908).

One tenant in common is entitled to an injunction against his co-tenants to restrain unusual and unreasonable waste, indicating malice and tending to destroy the chief value of the land. *Leatherbury v. McInnis*, 85 Miss. 160, 37 So. 1018, 107 Am. St. R. 274 (1905) but see *Threatt v. Rushing*, 361 So. 2d 329 (Miss. 1978).

An injunction will not lie at the suit of one asserting ownership of land to restrain the cutting of timber by a solvent

person in possession claiming title in good faith, there being no pending suit to which the injunctive relief is ancillary. *J.E. N. Lumber Co. v. Gary*, 83 Miss. 640, 36 So. 2 (1904).

12. —Elections.

Referendum election cannot be enjoined. *Power v. Ratliff*, 112 Miss. 88, 72 So. 864, Am. Ann. Cas. 1918E, 1446 (1916).

Chancery court has jurisdiction to enjoin election in violation of Constitution and laws of the state. *Conner v. Gray*, 88 Miss. 489, 41 So. 186, 9 Am. Ann. Cas. 120 (1906).

Act providing for election to determine question of creating new county being constitutional, neither the election nor returns thereof can be enjoined. *Conner v. Gray*, 88 Miss. 489, 41 So. 186, 9 Am. Ann. Cas. 120 (1906).

13. —Nuisances.

In an action to abate a gambling place nuisance, a temporary injunction is not void because it does not describe the premises. *Alexander v. State*, 210 Miss. 527, 49 So. 2d 387 (1950), suggestion of error sustained, 210 Miss. 517, 49 So. 2d 890 (1951).

In a suit to abate a gambling place as a nuisance, the chancery court had power to issue temporary injunction inasmuch as § 1073, Code of 1942, specifically provides that all rules of evidence and of practice and procedure that pertain to courts of equity generally in this state may be invoked and applied in any injunction procedure thereunder and this evidences a legislative intent to grant the court the full use of its injunctive powers. *Alexander v. State*, 210 Miss. 527, 49 So. 2d 387 (1950), suggestion of error sustained, 210 Miss. 517, 49 So. 2d 890 (1951).

Municipality creates public nuisance, which equity court has power to enjoin, when it gathers surface waters from thirteen-acre area, much of it diverted from its natural flow, concentrates it into thirty-inch culvert and discharges it upon lot adjoining important thoroughfare, with outtake therefrom of only fifteen inches, resulting in unsightly and unsanitary mosquito-breeding pond constituting menace to public health. *City of Jackson v.*

Robertson, 208 Miss. 422, 44 So. 2d 523 (1950).

It is not essential to grant of relief against municipality that negligence be shown where created condition against which relief is sought constitutes public nuisance. *City of Jackson v. Robertson*, 208 Miss. 422, 44 So. 2d 523 (1950).

Gasoline filling station not nuisance per se but may be so operated as to become nuisance and subject to injunction. *National Ref. Co. v. Batte*, 135 Miss. 819, 100 So. 388, 35 A.L.R. 91 (1924).

Street railroad may be enjoined from maintaining tracks so near abutting property as to become nuisance. *Meridian Light & Ry. Co. v. Slaughter*, 98 Miss. 420, 53 So. 952 (1911).

14. —Taxes.

Chancery court may not enjoin prosecution by state, county, or municipality of appeal from tax assessment. *Edward Hines Yellow Pine Trustees v. Knox*, 144 Miss. 560, 108 So. 907 (1926).

Alleged intention of attorney-general in appeal from tax assessment, to secure 100% as against 60% assessment for other property not ground for injunction. *Edward Hines Yellow Pine Trustees v. Knox*, 144 Miss. 560, 108 So. 907 (1926).

A proceeding to assess property will not be enjoined. *Yazoo & Miss. V. Ry. v. Adams*, 73 Miss. 648, 19 So. 91 (1895).

An injunction does not lie against an alleged excessive assessment. *Board of Supvrs. v. Ames*, 3 So. 37 (Miss. 1887).

15. —Criminal prosecutions.

Criminal prosecutions which may result in fines and costs cannot be enjoined. *Board of Supvrs. v. Owen*, 100 Miss. 462, 56 So. 525 (1911).

Equity will not enjoin arrest and fining of merchant for alleged disturbance of peace by using a megaphone to call attention to clearance sale. *Pleasants v. Smith*, 90 Miss. 440, 43 So. 475, 122 Am. St. R. 317 (1907).

16. —Miscellaneous.

Evidence that production of salt water was increasing significantly so that oil-gas and mineral lessee faced imminent additional increase and that a very small pit was available to contain salt water, that

prudence on the part of the lessee necessitated immediate steps to take care of salt water, that the owner of surface rights to the land involved as well as other landowners were threatened with damages from overflows, that under the lease the lessee had the right to place pipes across the land of the surface rights owner, and that the surface rights owner determined that the lessee should not be allowed to place the pipeline across his lands without first making an advance settlement with him, justified both the temporary injunction without notice as well as the permanent injunction enjoining the surface rights owner from interfering with the laying of a pipeline across his lands. *Lance v. Mississippi Emp. Sec. Comm'n*, 279 So. 2d 622 (Miss. 1973).

As an exception to the general rule, an injunction will be granted at the instance of an incumbent of office to restrain a claimant from interfering with him, but the incumbent must show that he has possession of the office, and the prima facie right to occupy it, or there is no other person authorized by law to hold it, but where the complaint reflected that one other than the complainant was in possession of the office and performing their duties thereof, the claimant failed to come within the exception. *Lacey v. Noblin*, 238 Miss. 329, 118 So. 2d 336 (1960).

Chancery court may and, in proper case, will restrain its own citizens, or other persons within the control of its process, from prosecuting actions or proceedings in other states. *Poole v. Mississippi Publishers Corp.*, 208 Miss. 364, 44 So. 2d 467 (1950).

Ordinarily chancery will enjoin an action in another state where it appears that it is fraudulent or brought for purpose of vexing, harassing or oppressing an opponent, or that it is an evasion of laws of the domicil. *Poole v. Mississippi Publishers Corp.*, 208 Miss. 364, 44 So. 2d 467 (1950).

Rule to effect that citizen of one state may be enjoined from prosecuting action against another citizen of same state applies equally when injunction is sought to restrain citizen of one state from prosecuting action against nonresident corporation doing business with lawful authority in such state. *Poole v. Mississippi Publish-*

ers Corp., 208 Miss. 364, 44 So. 2d 467 (1950).

State courts cannot interfere with federal courts as general rule, but when defendant is resident citizen of this state he can be required by injunction to bring his proposed action of libel within this state, it not having been previously filed, since it is strictly proceeding in personam, where Congress has not fixed venue. *Poole v. Mississippi Publishers Corp.*, 208 Miss. 364, 44 So. 2d 467 (1950).

Chancery court properly enjoined defendant as resident citizen of this state from suing Delaware corporation, authorized to do business in this state and with its principal place of business in this state, in any Delaware court, state or federal, for tort action in libel, there being no federal statute prescribing venue for such action, where it appeared from bill that defendant was seeking more to obtain compromise than to prosecute good faith suit, and suit in state of Delaware would impose inequitable hardship and irreparable injury upon corporation. *Poole v. Mississippi Publishers Corp.*, 208 Miss. 364, 44 So. 2d 467 (1950).

Injunction against municipal water and electric light commissioners enjoining them from putting into effect disability and pension system for their employees as authorized by special legislative enactment is not proper when burden of showing unconstitutionality of enactment has not been met and it has not been shown that it was outside competence of legislature to authorize commissioners to establish proper system applicable to employees affected by the legislation. *Palmertree v. Garrard*, 207 Miss. 796, 43 So. 2d 381 (1949).

Mortgagee will not be enjoined from foreclosing until accounting can be had to ascertain whether mortgagors had setoff against mortgagee where claim was unliquidated and there was no allegation of insolvency of mortgagee. *Hub Bldg. & Loan Ass'n v. Warren*, 207 Miss. 297, 42 So. 2d 203 (1949).

State chancery court has jurisdiction to issue injunction on behalf of bus company engaged in interstate and intrastate commerce against labor union and its members to enjoin use of violence, force, intim-

idation, and coercion during labor dispute. *Southern Bus Lines v. Amalgamated Ass'n of St., Elec. Ry. & Motor Coach*, 205 Miss. 354, 38 So. 2d 765 (1949).

Jurisdiction of court of equity may be invoked by one being picketed for injunctive relief against mass picketing. *Southern Bus Lines v. Amalgamated Ass'n of St., Elec. Ry. & Motor Coach*, 205 Miss. 354, 38 So. 2d 765 (1949).

Bill alleging that unions and their members are maintaining picket lines around terminals, garages, office buildings and other property of complainant, are coercing, intimidating and threatening present and prospective employees, and are conspiring together to unlawfully, and by means of violence, prevent general public from using complainant's services alleges facts sufficient to invoke jurisdiction of court of equity and to obtain injunctive relief. *Southern Bus Lines v. Amalgamated Ass'n of St., Elec. Ry. & Motor Coach*, 205 Miss. 354, 38 So. 2d 765 (1949).

Chancellor properly denied injunction restraining husband from leaving jurisdiction of court for purpose of obtaining a divorce, under the particular circumstances, in wife's suit for separate support and maintenance. *Ballard v. Ballard*, 199 Miss. 316, 24 So. 2d 335 (1946).

A person may enjoin the unauthorized use of his name in the business of another, but the court will not enjoin the use of a name in a locality when no competition exists. *Cockrell v. Davis*, 198 Miss. 660, 23 So. 2d 256 (1945).

Evidence sustained finding that defendant, "James Davis Cockrell," in using the name "Jimmie Davis" in connection with his band did so for the purpose of capitalizing on the reputation and name of complainant, "James Harold Davis," who had been using the name "Jimmie Davis" which had acquired the attributes of a tradename and had become identified with complainant nationally, and that confusion resulted therefrom and that competition did exist, so that injunctive relief was proper. *Cockrell v. Davis*, 198 Miss. 660, 23 So. 2d 256 (1945).

Citizen of state may be enjoined from prosecuting action against another citizen

of same state in foreign jurisdiction to evade law of his own state. *Davis v. Natchez Hotel Co.*, 158 Miss. 43, 128 So. 871 (1930).

Equity can restrain replevin of piano bought on installment plan and decree redemption of the lien sought to be enforced by defendant. *McIntyre v. E.E. Forbes Piano Co.*, 100 Miss. 517, 56 So. 457 (1911).

Trustees and teacher of school district may be enjoined from enforcing an invalid rule. *Hobbs v. Germany*, 94 Miss. 469, 49 So. 515 (1909).

Ejectment based on invalidity of appointment of substituted trustee in deed of trust who sold land to complainant, will be enjoined where complainant has been in possession 8 years, the original debt has become barred, and complainant offers to do equity. *Wall v. Harris*, 90 Miss. 671, 44 So. 36 (1907).

A bill by debtors to determine to whom their debt should be paid is a bill of interpleader, although relief by injunction be asked, and the rights of the parties should be treated accordingly. *Quin v. Hart*, 85 Miss. 71, 37 So. 553 (1904).

A complainant in a bill of interpleader is not entitled to relief by injunction when he has paid nothing into court. *Quin v. Hart*, 85 Miss. 71, 37 So. 553 (1904).

17. Pleading.

Determination of plaintiff's right to injunction upon final hearing would not be determined upon demurrer but would be left until the hearing, in suit by district attorney on behalf of county or district thereof against member of board of supervisors of the district and his surety to recover loss resulting from unauthorized use of construction equipment for benefit of private individuals. *Shumpert v. Lee County*, 197 Miss. 513, 20 So. 2d 82 (1944).

Oath or other means, by which chancellor must be satisfied of complainant's equity and truth of allegations of bill before granting preliminary injunction, need not appear of record. *Hanna v. State ex rel. Rice*, 169 Miss. 314, 153 So. 371 (1934).

Complainant's bill seeking greater relief than is allowable is not bad on that account, as he is still entitled to all relief to which he shows a right. *State ex rel.*

Att'y Gen. v. Marshall, 100 Miss. 626, 56 So. 792, Am. Ann. Cas. 1914A,434 (1911).

It is not necessary in all cases that the bill be sworn to. It is sufficient if the chancellor be satisfied of complainant's equity "by oath or other means." Purvis v. Woodward, 78 Miss. 922, 29 So. 917 (1901).

18. Judgment or decree.

Clerk required to obey judgment though

injunction erroneous. Bruister v. Tansil, 99 So. 258 (Miss. 1924).

Fiat directing issuance of injunction held to limit clerk's authority in doing so, and not to be against discrimination in water rates where requirement was that waterworks company refrain from cutting off water supply. Griffith v. Vicksburg Waterworks Co., 88 Miss. 371, 40 So. 1011, 8 Am. Ann. Cas. 1130 (1906).

RESEARCH REFERENCES

ALR. Power to enjoin canvassing votes and declaring result of election. 1 A.L.R.2d 588.

Injunction by state court against action in court of another state. 6 A.L.R.2d 896.

Adequacy, as regards right to injunction, of other remedy for review of order fixing public utility rates. 8 A.L.R.2d 839.

Legality of, and injunction against, peaceful picketing to force employees to join union or to compel employer to enter into a contract which would in effect compel them to do so, in the absence of a dispute between employer and employees as to terms or conditions of employment. 11 A.L.R.2d 1338.

Remedy of tenant against stranger wrongfully interfering with his possession. 12 A.L.R.2d 1192.

Mandatory injunction prior to hearing of case. 15 A.L.R.2d 213.

Who, under Federal Rule 65(d) and state counterparts, are persons "in active concert or participation" with parties to action so as to be bound by order granting an injunction. 97 A.L.R.2d 490.

Recovery of damages resulting from

wrongful issuance of injunction as limited to amount of bond. 30 A.L.R.4th 273.

Propriety of injunction by federal court in civil action restraining prosecution of later civil action in another federal court where one or more parties or issues are, or allegedly are, same. 42 A.L.R. Fed. 592.

Who, under Rule 65(d) of Federal Rules of Civil Procedure, are persons "in active concert or participation" with parties to action so as to be bound by order granting injunction. 61 A.L.R. Fed. 482.

Am Jur. 42 Am. Jur. 2d, Injunctions §§ 1 et seq.

21 Am. Jur. Pl & Pr Forms (Rev), Records and Recording Laws, Form 4.1 (Complaint, petition, or declaration — For declaratory and injunctive relief — To compel sheriff to furnish television station with information on concealed weapons licenses).

21 Am. Jur. Pl & Pr Forms (Rev), Records and Recording Laws, Form 4.3 (Order — Preliminary injunction — Requiring disclosure of information on concealed weapons licenses).

CJS. 43 C.J.S., Injunctions § 32.

§ 11-13-3. Security required to stay proceedings at law.

An injunction to stay proceedings at law shall not be issued until after the party obtaining the injunction shall give security in such sum as the court deems proper for the payment of costs, damages and reasonable attorney's fees as may be incurred or suffered by any party who is found to be wrongfully enjoined.

SOURCES: Codes, Hutchinson's 1848, ch. 54, art. 2 (43); 1857, ch. 62, art. 65; 1871, § 1044; 1880, § 1905; 1892, § 558; Laws, 1906, § 609; Hemingway's 1917, § 369; Laws, 1930, § 416; Laws, 1942, § 1336; Laws, 1991, ch. 573, § 24, eff from and after July 1, 1991.

Cross References — Bond for stay of execution, see § 11-51-59.

The restoration of money on enjoining of execution, see § 13-3-183.

Injunctions, see Miss. R. Civ. P. 65.

Rule governing the procedure for injunctions, see Miss. R. Civ. P. 65.

JUDICIAL DECISIONS

1. In general.
2. Dissolution of injunction.

1. In general.

This section [Code 1942, § 1336] does not apply to a suit to restrain a building contractor from foreclosing a deed of trust executed by the owner until he should have fully performed his contract. *AQS Lumber Co. v. Heathman*, 246 Miss. 314, 149 So. 2d 335 (1963).

Where injunction bond as originally written was sufficient, permitting amendment showing signers were sureties and making condition accord with statutory requirement held not prejudicial. *Davis v. Natchez Hotel Co.*, 158 Miss. 43, 128 So. 871 (1930).

Chancery clerk taking injunction bond in proper amount is not subject to statutory penalty or damages if sureties are solvent. *Davis v. Hale*, 155 Miss. 309, 124 So. 370 (1929).

Equity has jurisdiction to restrain proceedings at law only where some equitable

ground exists, and remedy at law is not plain, adequate, and complete. *Edward Hines Yellow Pine Trustees v. Knox*, 144 Miss. 560, 108 So. 907 (1926).

2. Dissolution of injunction.

Injunction to stay proceedings at law must be dissolved where plaintiff fails to give bond in double the amount of the debt sued for. *Tillman v. Heard*, 95 Miss. 238, 48 So. 963 (1909).

Injunction of foreclosure of trust deed after advertisement for sale, later dissolved, entitled defendant to counsel fees for procuring dissolution and for printer's fees for the advertisement. *Gulfport Land & Imp. Co. v. Augur*, 95 Miss. 292, 48 So. 722 (1909).

On the partial dissolution of an injunction by a county to restrain an action of ejectment for lands held by it, attorney's fees and interest on rents may be allowed. *Allen v. Leflore County*, 80 Miss. 298, 31 So. 815 (1902).

RESEARCH REFERENCES

ALR. Partial dissolution of injunction as breach of injunction bond. 40 A.L.R. 990.

Bond as prerequisite to temporary restraining order. 73 A.L.R.2d 854.

Am Jur. 42 Am. Jur. 2d, Injunctions §§ 185-218.

14 Am. Jur. Pl & Pr Forms (Rev), Injunctions, Forms 61-66 (Bond or other security).

10 Am. Jur. Legal Forms 2d, Injunctions §§ 147:7 et seq. (injunction bond).

CJS. 43 C.J.S., Injunctions §§ 41-59.

§ 11-13-5. Bond when injunction is not to stay proceedings at law.

Where the injunction shall not be for the stay of proceedings in an action at law for the recovery of money, or upon a judgment requiring the payment of money, the party applying for the injunction shall, before the issuance of the same, enter into bond in like manner as provided for in Section 11-13-3, in a sufficient penalty, to be fixed by the judge granting the same, conditioned for the payment of all damages and costs which may be awarded against him, or

which the opposite party may suffer or sustain by reason of the suing out of said injunction, in case the same shall be dissolved.

SOURCES: Codes, 1857, ch. 62, art. 66; 1871, § 1045; 1880, § 1906; 1892, § 559; Laws, 1906, § 610; Hemingway's 1917, § 370; Laws, 1930, § 417; Laws, 1942, § 1337.

Cross References — Injunction against unfair competition with electric power association, see § 77-5-509.

Injunction to enforce contract with cooperative marketing association, see § 79-19-33.

Rule governing the procedure for injunctions, see Miss. R. Civ. P. 65.

JUDICIAL DECISIONS

1. In general.
2. Liability on bond.
3. Damages in general.
4. —Attorney fees.
5. Measure of damages.

1. In general.

The chancery court erred in denying a motion to dissolve a preliminary injunction where the injunction had been issued without the required bond having first been posted. *Invesat Corp. v. Harrison Enters., Inc.*, 386 So. 2d 721 (Miss. 1980).

The bond provided for by this section [Code 1942 § 1337] is mandatory, and its amount is within the sound discretion of the chancellor whose decision will not be disturbed on appeal unless this discretion has been abused. *International Ass'n of Bridge, Structural & Ornamental Ironworkers v. Howard L. Byrd Bldg. Serv., Inc.*, 284 So. 2d 301 (Miss. 1973).

This section [Code 1942, § 1337] provides the method for determining the amount of an injunction bond in a suit to restrain a building contractor from foreclosing a deed of trust executed by the owner until he should have fully performed his contract. *AQS Lumber Co. v. Heathman*, 246 Miss. 314, 149 So. 2d 335 (1963).

Appellees were not entitled to an injunction to prevent the foreclosure of a deed of trust where they did not give an injunction bond sufficient for the payment of the damages allowed by Code 1942, § 1352, in the event of its dissolution. *Federal Land Bank v. Brumfield*, 185 Miss. 487, 187 So. 522 (1939).

Chancery court had no authority to issue preliminary mandatory injunction un-

til bond was given and approved as provided by this section [Code 1942, § 1337]. *Morris v. Trussell*, 144 Miss. 343, 109 So. 854 (1926).

Sequestration bond is distinct from injunction bond. *Harleston v. West La. Bank*, 126 Miss. 593, 89 So. 257 (1921).

Writ issued without bond given is void. *Castleman v. State*, 94 Miss. 609, 47 So. 647 (1908).

2. Liability on bond.

Court's lack of jurisdiction to grant injunction held no defense in action on injunction bond. *Johnson v. Howard*, 167 Miss. 475, 141 So. 573 (1932).

That defendants were not damaged, but were only restrained from proceeding in unlawful manner, held no defense in action on injunction bond. *Johnson v. Howard*, 167 Miss. 475, 141 So. 573 (1932).

Expenses not shown to be necessary and not properly separated from expenses incurred before issuance of injunction could not be allowed in action on injunction bond. *Johnson v. Howard*, 167 Miss. 475, 141 So. 573 (1932).

Damages and attorney's fees on dissolution held not liable where injunction rightfully sued out. *United States Fid. & Guar. Co. v. Jackson*, 123 Miss. 676, 86 So. 456 (1920).

The dismissal of the appeal dissolves the injunction, conclusively determines that it was wrongfully sued out, and makes the bond liable. *Yale v. Baum*, 70 Miss. 225, 11 So. 879 (1892).

3. Damages in general.

Dismissal of bill establishes that injunction was wrongfully sued out, and that

defendant is entitled to damages sustained by issuing of injunction. *Johnson v. Howard*, 167 Miss. 475, 141 So. 573 (1932).

Members of political party could sue as individuals for expenses incurred as result of wrongful issuance of injunction restraining holding of primary elections and conventions. *Johnson v. Howard*, 167 Miss. 475, 141 So. 573 (1932).

Damages for wrongful issuance of injunction may be allowed on appeal. *Brooks-Scanlon Co. v. Stogner*, 114 Miss. 736, 75 So. 596 (1917).

4. —Attorney fees.

In suit for perpetual injunction to restrain defendants from utilizing space for any purpose other than right of way as actual means of access to their property, complainant is not entitled to recover damages by way of attorneys' fees when only hearing of cause was full trial upon merits. *Feld v. Young Men's Hebrew Ass'n*, 208 Miss. 451, 44 So. 2d 538 (1950).

Allowance of attorney's fees under provision of note therefor, if it should be put in attorney's hands for collection, held erroneous as damage in injunction suit. *Middleton v. Zachary*, 136 Miss. 395, 101 So. 558 (1924).

Attorney's fees do not include services in assessing damages after dissolution of the injunction. *Thornton-Claney Lumber Co. v. J.M. O'Quin & Sons*, 115 Miss. 857, 76 So. 732 (1917).

Injunction bond in an unsuccessful suit against city covers amount necessary to pay special counsel to assist city attorney. *Vicksburg Waterworks Co. v. City of Vicksburg*, 99 Miss. 132, 54 So. 852, Am. Ann. Cas. 1913D,917 (1911).

Solicitors' fees are allowable as damages upon the dissolution of an injunction restraining the board of supervisors of a county from removing a county seat. *Hinton v. Board of Supvrs.*, 84 Miss. 536, 36 So. 565 (1904).

Where a suit is alone for an injunction which is dissolved and the complainant is cast in the suit, attorney's fees incurred in defending the whole case should be allowed. *Jamison v. Town of Houston*, 74 Miss. 890, 21 So. 972 (1897).

Board of supervisors held liable on injunction bond for actual damages, including attorney's fees. *Freeman v. Supvrs.*, 66 Miss. 1, 5 So. 516 (1889).

The bond covers attorney's fees and costs of the transcript of papers used on the trial. *Baggett v. Beard*, 43 Miss. 120 (1870).

5. Measure of damages.

Damages, besides attorney's fees, for injunction preventing sale of lumber is difference in price of lumber when injunction sued out and its value when dissolved, with interest on difference for the period. *Thornton-Claney Lumber Co. v. J.M. O'Quin & Sons*, 115 Miss. 857, 76 So. 732 (1917).

RESEARCH REFERENCES

ALR. Limitation of antitrust damages under 15 USCS § 15 to amount of injunction bond where there has been per se violation of § 1 of Sherman Act (15 USCS § 1). 50 A.L.R. Fed. 575.

Am Jur. 42 Am. Jur. 2d, Injunctions §§ 282-291.

14 Am. Jur. Pl & Pr Forms (Rev), Injunctions, Forms 61-66 (Bond or other security).

10 Am. Jur. Legal Forms 2d, Injunctions §§ 147:7 et seq. (injunction bond).

CJS. 43 C.J.S., Injunctions §§ 168-174.

Law Reviews. Symposium on Mississippi Rules of Civil Procedure: Provisional and Final Remedies and Special Proceedings — Rules 64-71. 52 Miss. L. J. 183, March 1982.

§ 11-13-7. Bonds in particular cases.

If the injunction be to stay a sale under execution of certain designated property, real or personal, or any proceeding at law as to certain specified things, and not to restrain proceedings at law generally, bond may be given as

provided in Section 11-13-5; but if the injunction shall be obtained on the ground of some objection to the judgment or execution, or the demand of the party enjoined to sustain his claim, and shall not be confined to a contest of his right to subject to his demand particular property by his proceeding, bond shall be given as prescribed in Section 11-13-3.

SOURCES: Codes, 1880, § 1907; 1892, § 560; Laws, 1906, § 611; Hemingway's 1917, § 371; Laws, 1930, § 418; Laws, 1942, § 1338.

Cross References — Restoration of personal property levied on, see § 11-13-19.
Rule governing the procedure for injunctions, see Miss. R. Civ. P. 65.

RESEARCH REFERENCES

ALR. Constitutionality, construction, and application of statute as to effect of taking appeal, or staying execution, on right to redeem from execution or judicial sale. 44 A.L.R.4th 1229.

Am Jur. 42 Am. Jur. 2d, Injunctions §§ 282-291.

14 Am. Jur. Pl & Pr Forms (Rev), Injunctions, Forms 61-66 (Bond or other security).

7 Am. Jur. Proof of Facts 3d 1, Injuries from Drugs.

CJS. 43 C.J.S., Injunctions §§ 168-174.

§ 11-13-9. Bond not required of state, county, municipality.

Neither the state, nor any county, nor any municipality, nor any state officer of the state suing out an injunction in his official character, shall be required to give bond to obtain an injunction.

SOURCES: Codes, 1880, § 1909; 1892, § 562; Laws, 1906, § 613; Hemingway's 1917, § 373; Laws, 1930, § 419; Laws, 1942, § 1339; Laws, 1908, ch. 158.

Cross References — Injunctions, see Miss. R. Civ. P. 65.

RESEARCH REFERENCES

Am Jur. 42 Am. Jur. 2d, Injunctions § 287.

CJS. 43 C.J.S., Injunctions §§ 169-174.

§ 11-13-11. Restraint on collection of taxes.

The chancery court shall have jurisdiction of suits by one or more taxpayers in any county, city, town, or village, to restrain the collection of any taxes levied or attempted to be collected without authority of law.

SOURCES: Codes, 1880, § 1831; 1892, § 483; Laws, 1906, § 533; Hemingway's 1917, § 290; Laws, 1930, § 420; Laws, 1942, § 1340.

Cross References — Prohibition against injunction to restrain the collection of sales taxes, see § 27-65-71.

Injunction to restrain the collection of tobacco tax, see § 27-69-43.

Prohibition of injunction to restrain collection of contributions for unemployment compensation, see § 71-5-381.

Rule governing the procedure for injunctions, see Miss. R. Civ. P. 65.

JUDICIAL DECISIONS

1. In general.
2. Right and propriety of action.
3. —Necessity of tender of tax legally due.
4. —Tax assessment.
5. Proceedings in general.

1. In general.

The statute provides state citizens with a plain, speedy, and efficient remedy for challenging a municipal tax, including actions in which a citizen seeks a refund. *Home Bldrs. Ass'n v. City of Madison*, 143 F.3d 1006 (5th Cir. 1998).

Title 27, Chapter 7, and particularly § 11-13-11, provide a sufficiently plain, speedy, and efficient remedy to satisfy the Tax Injunction Act; § 27-73-1 is analogous to a general statute of limitations which gives way to a specific statute, so that this section in no way interferes with or prevents recovery under income tax refund statutes. *Todd v. Johnson*, 718 F. Supp. 1305 (S.D. Miss. 1989).

Under § 11-13-11, which provides the Chancery Court with jurisdiction over suits by taxpayers to restrain the collection of taxes levied without authority of law, the court has the authority to enjoin the collection or assessment of taxes, and once a complaint has been filed demanding relief of the sort contemplated by § 11-13-11, the Chancery Court has subject matter jurisdiction. The language of § 27-65-71, which purports to bar application of § 11-13-11 to taxes imposed by the sales tax chapter, is only effective if the case fails to meet the legislatively and judicially created requirements necessary to invoke jurisdiction under the latter statute. *Marx v. Truck Renting & Leasing Ass'n*, 520 So. 2d 1333 (Miss. 1987).

Under this section, it is unnecessary that the taxpayer must have sought redress before the proper authorities or must have invited other taxpayers to join him, and the only factor to be taken into consideration in deciding whether to grant injunctive relief is whether the taxpayer has no adequate remedy at law. *Fondren v. State Tax Comm'n*, 350 So. 2d 1329 (Miss. 1977).

Code 1942, § 1340 provides taxpayers with a plain, speedy, and efficient remedy,

thus precluding federal jurisdiction. *Bland v. McHann*, 463 F.2d 21 (5th Cir. 1972), cert. denied, 410 U.S. 966, 93 S. Ct. 1438, 35 L. Ed. 2d 700 (1973).

This section [Code 1906, § 533] is only authority of equity to enjoin collection of taxes. *Purvis v. Robinson*, 110 Miss. 64, 69 So. 673 (1915).

2. Right and propriety of action.

Taxpayers seeking to challenge the authority of the Board of Supervisors in letting appraisal contracts under § 27-35-101 were not entitled to injunctive relief under § 11-13-11 where the taxpayers had a complete and adequate remedy at law through § 27-35-119. *Lewis v. Mass Appraisal Servs., Inc.*, 396 So. 2d 35 (Miss. 1981).

In a taxpayer's suit to enjoin the State Tax Commission from approving each county's recapitulation of its assessment rolls until such time as the Commission should comply with its duty to equalize assessments among counties as provided by Code 1972 §§ 27-35-113 et seq. and Const. 1890 Art. 4 § 112, the complaint was sufficient to warrant the conclusion that the Commission's legal remedies were provided by Code 1972 § 27-35-163, which allow a taxpayer to obtain a judicial determination that a particular piece of property has been improperly assessed and to obtain a reduction in the tax, or by Code 1972 § 27-35-93 & § 27-35-119, which prescribe methods by which to determine the proper assessment of the particular piece of property, since plaintiff-taxpayer was not alleging an erroneous computation of the value of actions result in the collection of taxes "without authority of law" as a prerequisite for injunctive relief under Code 1972 § 11-13-11, where the complaint alleged the Commission's failure over a period of many years to carry out its duty of equalizing assessments and in essence alleged that owners of parcels of land of identical value in different counties may face radically different tax liabilities; no adequate his property and was not seeking a new calculation of his tax. *Fondren v. State Tax Comm'n*, 350 So. 2d 1329 (Miss. 1977).

This section [Code 1942, § 1340] does not justify proceeding to enjoin collection of additional sale tax assessment where judgment sustaining the validity of such assessment had been affirmed by supreme court. *Viator v. Edwins*, 195 Miss. 220, 14 So. 2d 212 (1943), cert. denied, 321 U.S. 744, 64 S. Ct. 518, 88 L. Ed. 1047 (1944), reh'g denied, 321 U.S. 804, 64 S. Ct. 779, 88 L. Ed. 1090 (1944).

Even though it should be conceded that this section [Code 1942, § 1340] dispenses with a necessity for showing an independent equity in order to entitle a taxpayer to an injunction, it certainly does not do so when the taxes have been levied and are sought to be collected with authority of law. *Stone v. Kerr*, 194 Miss. 646, 10 So. 2d 845 (1942).

The language of the statute "without authority of law" imports more than mere irregularity or errors of computation, and the correction of improper charges involves matters remediable by appeal or original suit and presupposes jurisdiction. *Stone v. Kerr*, 194 Miss. 646, 10 So. 2d 845 (1942).

If the proceedings of the state tax commission for the imposition and assessment of tax are void, or if the commission acts in a manner beyond its jurisdiction, or in an unauthorized manner, it acts "without authority of law," but in the event that the hearing is for "a correction of the amount of the tax so assessed" and by a "person improperly charged" with the tax, who is "required to pay the same," it involves at most "an irregularity," and an injunction will not lie. *Stone v. Kerr*, 194 Miss. 646, 10 So. 2d 845 (1942).

Where bank voluntarily paid taxes and did not avail itself of statutory remedies to cure alleged errors, receiver of bank held not entitled to mandamus to compel attorney general to approve refund. *Selig v. Price*, 167 Miss. 612, 142 So. 504 (1932).

Consolidated school district tax, levied without separate assessment of property in district, void, and collection enjoined. *Morgan v. Wood*, 140 Miss. 137, 106 So. 435 (1925).

Court cannot restrain collection of taxes on ground of illegality before the auditor makes assessment thereof. *Thompson v. Kreutzer*, 103 Miss. 388, 60 So. 334 (1913).

Collection of taxes under law creating school for white children and making no provision for colored children, may be enjoined. *McFarland v. Goins*, 96 Miss. 67, 50 So. 493 (1909).

Where municipal authorities levy a tax for a proper purpose in excess of the legal limit, the collection of the excess only should be enjoined. *Lewis v. Village of Bogue Chitto*, 76 Miss. 356, 24 So. 875 (1899).

The court will enjoin a tax levied by the board of supervisors in a matter over which it has no jurisdiction. *Browning v. Matthews*, 73 Miss. 343, 18 So. 658 (1895).

3. —Necessity of tender of tax legally due.

If by reason of illegal proceedings no valid charge on property is effected, the taxpayer may enjoin without tendering anything. *Ball v. City of Meridian*, 67 Miss. 91, 6 So. 645 (1889).

Where part of the tax is legally assessable, and that part is tendered and refused, a bill to enjoin the collection of the excess is maintainable without tendering therewith the part that is legal. *City of Meridian v. George*, 67 Miss. 86, 6 So. 619 (1889).

4. —Tax assessment.

The jurisdiction conferred does not entitle one who complains of an excessive assessment to exhibit his bill for relief. *Board of Supvrs. v. Ames*, 3 So. 37 (Miss. 1887).

A proceeding to assess property is not "an attempt to collect" them within the meaning of this section [Code 1942, § 1340], and the court will not enjoin the assessment of taxes. *Yazoo & Miss. V. Ry. v. Adams*, 73 Miss. 648, 19 So. 91 (1895); *Portwood v. Baskett*, 64 Miss. 213, 1 So. 105 (1887).

The remedy of a taxpayer aggrieved by the action of the board of supervisors in increasing the assessment of his property is by an appeal to the circuit court; and failing to pursue this course, he cannot obtain relief in a court of chancery. *Anderson v. Ingersoll*, 62 Miss. 73 (1884).

5. Proceedings in general.

Taxpayer who had joined with others to obtain injunction restraining collection of

privilege taxes for operation of billiard and pool halls held liable for own taxes only on dissolution of injunction and dismissal of bill, regardless of terms of injunction bond. *Hamel v. Marlow*, 171 Miss. 559, 157 So. 255, 96 A.L.R. 924 (1934), modified on suggestion of error, 171 Miss. 565, 157 So. 905, 96 A.L.R. 924 (1934).

Unsuccessful contest of validity of privilege tax, though prosecuted in good faith, does not relieve taxpayer of penalty imposed for nonpayment thereof when due. *Hamel v. Marlow*, 171 Miss. 559, 157 So. 255, 96 A.L.R. 924 (1934), modified on suggestion of error, 171 Miss. 565, 157 So. 905, 96 A.L.R. 924 (1934).

RESEARCH REFERENCES

ALR. Financial hardship or inability to pay as rendering inapplicable statutes denying remedy by injunction against tax assessment or collection. 65 A.L.R.2d 550.

Am Jur. 42 Am. Jur. 2d, Injunctions §§ 170-184.

CJS. 43 C.J.S., Injunctions § 130.

§ 11-13-13. Security required to enjoin collection of taxes.

An injunction shall not be granted to stay the collection of state, county, city, town or village taxes unless upon condition that, before its issuance, the party obtaining it shall give security to the state in such sum as the court deems proper for the payment of damages, costs, and reasonable attorney's fees as may be incurred or suffered by the state, in case the injunction shall be dissolved.

SOURCES: Codes, 1880, § 1908; 1892, § 561; Laws, 1906, § 612; Hemingway's 1917, § 372; Laws, 1930, § 421; Laws, 1942, § 1341; Laws, 1991, ch. 573, § 25, eff from and after July 1, 1991.

Cross References — Rule governing the procedure for injunctions, see Miss. R. Civ. P. 65.

JUDICIAL DECISIONS

1. In general.

Interest on delinquent taxes cannot be recovered as damages. *Illinois Cent. R.R. v. Adams*, 78 Miss. 895, 29 So. 996 (1901).

A municipality defending by its attorney, whose annual salary is his only compensation for the service, is not entitled to

counsel fees by way of damages on the dissolution of an injunction. *Nixon v. City of Biloxi*, 76 Miss. 810, 25 So. 664 (1899).

Execution of the bond is a condition precedent to the remedy by injunction. *Yazoo & Miss. V. Ry. v. Adams*, 73 Miss. 648, 19 So. 91 (1895).

RESEARCH REFERENCES

Am Jur. 42 Am. Jur. 2d, Injunctions §§ 282-291.

junctions, Forms 61-66 (Bond or other security).

14 Am. Jur. Pl & Pr Forms (Rev), In-

CJS. 43 C.J.S., Injunctions §§ 168-174.

§ 11-13-15. Procedure for injunction of the collection of taxes.

All causes in which it is sought to enjoin or delay the collection of any taxes imposed by competent authority shall be preference cases, and tried at the

earliest moment compatible with the ends of justice. Upon a dissolution of any such injunction, the chancellor or court ordering it dissolved shall enter a judgment against the person suing out the same and the sureties on his injunction bond, for the amount of the taxes so enjoined and ten percent (10%) thereon, and all costs of suit. Such judgment shall be enforced by execution for the use of the state or county, or both, or of the city, town or village, as the case may require. The said judgment shall be a lien from its date upon the property of the persons against whom it is rendered; and all the property on which the taxes enjoined were assessed shall remain bound by the lien for taxes declared by law, notwithstanding such injunction; and such property may be sold under the execution upon such judgment.

SOURCES: Codes, 1871, § 1751; 1880, § 576; 1892, § 484; Laws, 1906, § 534; Hemingway's 1917, § 291; Laws, 1930, § 422; Laws, 1942, § 1342; Laws, 1991, ch. 573, § 26, eff from and after July 1, 1991.

Cross References — Rule governing the procedure for injunctions, see Miss. R. Civ. P. 65.

JUDICIAL DECISIONS

1. In general.

Unsuccessful contest of validity of privilege tax, though prosecuted in good faith, does not relieve taxpayer of penalty imposed for nonpayment thereof when due. *Hamel v. Marlow*, 171 Miss. 559, 157 So. 255, 96 A.L.R. 924 (1934), modified on

suggestion of error, 171 Miss. 565, 157 So. 905, 96 A.L.R. 924 (1934).

Damages are limited to 10% on dissolution of injunction against collection of taxes. *Bullen v. Smith*, 146 Miss. 316, 111 So. 454 (1927).

RESEARCH REFERENCES

Am Jur. 42 Am. Jur. 2d, Injunctions §§ 302-314.

14 Am. Jur. Pl & Pr Forms (Rev), Injunctions, Forms 71-101 (Continuance,

modification, or dissolution of restraining order or injunction).

CJS. 43 C.J.S., Injunctions §§ 267-279.

§ 11-13-17. Dissolution or modification of injunction of tax collection; general powers.

The provisions of Section 11-13-15 shall apply to a partial dissolution of an injunction of the collection of taxes and to an injunction of the sale of any property for taxes. In all cases of the injunction of the collection of taxes, or of the sale of any property for taxes, the court, or chancellor in vacation, in dissolving in part or in whole, or in modifying an injunction, shall have full power to make such judgment as may be necessary to enforce the right of the state, county, city, town, village, or other competent authority entitled to the taxes involved in such suit, and may direct a sale of any property liable to such taxes, and involved in such suit.

SOURCES: Codes, 1880, § 577; 1892, § 485; Laws, 1906, § 535; Hemingway's 1917, § 292; Laws, 1930, § 423; Laws, 1942, § 1343; Laws, 1991, ch. 573, § 27, eff from and after July 1, 1991.

Cross References — Rule governing the procedure for injunctions, see Miss. R. Civ. P. 65.

RESEARCH REFERENCES

Am Jur. 42 Am. Jur. 2d, Injunctions, modification, or dissolution of restraining order or injunction).
§§ 304-311.

14 Am. Jur. Pl & Pr Forms (Rev), In- **CJS.** 43 C.J.S., Injunctions §§ 257,
junctions, Forms 71-101 (Continuance, 260-277.

§ 11-13-19. Chancellor may order return of personal property; execution.

When an injunction shall be granted to stay the sale of personal property, levied on by virtue of an execution, the chancellor may order the property to be restored to the plaintiff, on his giving bond to the sheriff, in such amount and with sufficient sureties as the judge deems proper, payable to the plaintiff in the execution, and conditioned for the redelivery of the property to the sheriff in case the injunction shall be dissolved. Such bond shall be returned by the sheriff with the execution, and shall have the force and effect of a judgment. Liability thereupon may be enforced by the procedure provided for in the Mississippi Rules of Civil Procedure. In case the property shall not be redelivered to the sheriff within fifteen (15) days after the dissolution of the injunction, the clerk of the court to which the bond was returned shall issue execution thereon for the amount of the assessed value of said property and all costs. But in such case, the lien on the property created by the judgment and the execution and levy, shall remain in force; and the sheriff, on a writ of venditioni exponas, or other order of sale, may seize the property so levied on wherever the same may be found.

SOURCES: Codes, 1857, ch. 62, art. 67; 1871, § 1046; 1880, § 1912; 1892, § 565; Laws, 1906, § 616; Hemingway's 1917, § 376; Laws, 1930, § 424; Laws, 1942, § 1344; Laws, 1991, ch. 573, § 28, eff from and after July 1, 1991.

Cross References — Rule governing the procedure for injunctions, see Miss. R. Civ. P. 65.

JUDICIAL DECISIONS

1. In general.

Upon dissolution of injunction restraining execution sale of personalty, personal decree should not be rendered against obligors on injunction bond for amount of

judgment or debt enjoined, only defendant's damages should be allowed. *Gotelli v. Fountain*, 127 Miss. 577, 90 So. 250 (1922).

RESEARCH REFERENCES

Am Jur. 42 Am. Jur. 2d, Injunctions § 52; 27 Am. Jur. 2d, Equity § 36.

14 Am. Jur. Pl & Pr Forms (Rev), Injunctions, Form 13.2 (Motion or application — Temporary injunction — Action by administrator of estate — For sale of mobile home).

14 Am. Jur. Pl & Pr Forms (Rev), Injunctions, Form 41.2 (Order — Granting temporary injunction — Sale of mobile home by decedent's estate).

CJS. 43 C.J.S., Injunctions § 68.

§ 11-13-21. Return of personal property; other causes.

When an injunction shall be granted to stay a sale of personal property seized under a deed of trust or mortgage with power of sale, or in any case in which the sale of such property may be enjoined, the judge may order the property to be restored to the plaintiff on his giving bond to the sheriff in such amount and with sufficient sureties as the judge deems proper, payable to the person by whom such property is to be surrendered and conditioned for the return of the property to the person surrendering it, if the injunction shall be dissolved. Such bond shall be returned by the sheriff with the execution and shall have the force and effect of a judgment. Liability thereupon may be enforced by the procedure provided for in the Mississippi Rules of Civil Procedure. If not discharged by the delivery, within fifteen (15) days after the dissolution of the injunction, of the property to the person in whose possession it was before said order for the restoration to the plaintiff, execution shall be issued on such bond by the clerk for the value of said property.

SOURCES: Codes, 1880, § 1913; 1892, § 566; Laws, 1906, § 617; Hemingway's 1917, § 377; Laws, 1930, § 425; Laws, 1942, § 1345; Laws, 1991, ch. 573, § 29, eff from and after July 1, 1991.

Cross References — Temporary injunctions to abate a nuisance, see §§ 95-3-7, 95-3-9.

Rule governing the procedure for injunctions, see Miss. R. Civ. P. 65.

RESEARCH REFERENCES

Am Jur. 27 Am. Jur. 2d, Equity § 36.
42 Am. Jur. 2d, Injunctions §§ 302-314.
13 Am. Jur. Legal Forms 2d, Mortgages § 179:456.2.

CJS. 43 C.J.S., Injunctions §§ 68, 267, 278.

§§ 11-13-23 through 11-13-29. Repealed.

Repealed by Laws, 1991, ch. 573, § 141, eff from and after July 1, 1991.

§ 11-13-23. [Codes, 1857, ch. 62, art. 71; 1871, § 1050; 1880, § 1910; 1892, § 563; 1906, § 614; Hemingway's 1917, § 374; 1930, § 426; 1942, § 1346]

§ 11-13-25. [Codes, Hutchinson's 1848, ch. 54, art. 19 (6); 1857, ch. 62, art. 68; 1871, § 1047; 1880, § 1911; 1892, § 564; 1906, § 615; Hemingway's 1917, § 375; 1930, § 427; 1942, § 1347]

§ 11-13-27. [Codes, 1857, ch. 62, art. 70; 1871, § 1049; 1880, § 1914; 1892, § 567; 1906, § 618; Hemingway's 1917, § 378; 1930, § 428; 1942, § 1348]

§ 11-13-29. [Codes, 1880, § 1915; 1892, § 568; 1906, § 619; Hemingway's 1917, § 379; 1930, § 429; 1942, § 1349]

Editor's Note — Former § 11-13-23 provided for the dissolution of injunctions granted in vacation unless a bill was filed by the first term.

Former § 11-13-25 pertained to release of errors by injunction.

Former § 11-13-27 pertained to motions to dissolve injunctions.

Former § 11-13-29 pertained to the effect of a motion to dissolve an injunction when a motion to strike the answer was pending.

§ 11-13-31. Motion to dissolve injunction; affidavits; evidence.

Either party may, on the hearing of a motion to dissolve an injunction on bill and answer, read in evidence affidavits taken by him, on two days' notice to the opposite party of the time and place of taking such affidavits, and may also introduce oral or documentary evidence, or both, at the hearing.

SOURCES: Codes, 1880, § 1916; 1892, § 569; Laws, 1906, § 620; Hemingway's 1917, § 380; Laws, 1930, § 430; Laws, 1942, § 1350; Laws, 1922, ch. 227.

Cross References — Rule governing the procedure for injunctions, see Miss. R. Civ. P. 65.

JUDICIAL DECISIONS

1. In general.

Where answer under oath was waived in bill and cause was submitted on pleadings, neither party could rely on pleadings as evidence on hearing to dissolve injunction. *Davis v. Natchez Hotel Co.*, 158 Miss. 43, 128 So. 871 (1930).

Question, whether where complainant waives answer under oath, sworn answer can be treated as affidavit on motion to dissolve. *Hentz v. Delta Bank*, 76 Miss. 429, 24 So. 902 (1898).

RESEARCH REFERENCES

Am Jur. 42 Am. Jur. 2d, Injunctions §§ 302-314.

CJS. 43 C.J.S., Injunctions §§ 267-279.

§ 11-13-33. Injunction bond as judgment.

A bond to enjoin proceedings at law on a judgment for money, upon the dissolution of the injunction, in whole or in part, shall have the force and effect of a judgment against the obligors; and liability of such sureties may be enforced under the procedure provided for in the Mississippi Rules of Civil Procedure.

SOURCES: Codes, 1880, § 1920; 1892, § 571; Laws, 1906, § 622; Hemingway's 1917, § 382; Laws, 1930, § 431; Laws, 1942, § 1351; Laws, 1991, ch. 573, § 30, eff from and after July 1, 1991.

Cross References — Bond required to stay proceedings at law, see § 11-13-3. Restoration of money on enjoining of execution, see § 13-3-183. Injunctions, see Miss. R. Civ. P. 65.

JUDICIAL DECISIONS

1. In general.
2. Execution, issuance of.

1. In general.

A decree dissolving a temporary injunction should not include a personal judgment against the plaintiff and the sureties on his bond. *Eubanks v. W.H. Hodges & Co.*, 207 So. 2d 640 (Miss. 1968).

Where there was a final judgment rendered against sureties on "replevin bond," the amount of judgment being for \$500 and costs, but where an injunction was obtained staying proceedings at law on the judgment and also enjoining the sale of property under execution on the judgment, and where the writ of injunction was dissolved by the Supreme Court, the judgment creditor was entitled to the above judgment with legal interest together with five per cent as damages and to all costs in all courts. *Murdock Acceptance Corp. v. Smith*, 222 Miss. 594, 76 So. 2d 688 (1955), corrected, 222 Miss. 608, 77 So. 2d 727 (1955).

Upon dissolution of injunction restraining execution sale of personalty, personal decree should not be awarded against obligors on injunction bond for amount of judgment or debt enjoined but only for such damages as defendant may have sustained. *Gotelli v. Fountain*, 127 Miss. 577, 90 So. 250 (1922).

Where injunction restraining execution of a money judgment at law is partly dissolved, personal judgment for true

amount of indebtedness should not be granted. *Courtney Bros. v. John Deere Plow Co.*, 122 Miss. 232, 84 So. 185 (1920), motion granted, 122 Miss. 611, 84 So. 690 (1920).

Sureties on bond are released by extension of time for valuable consideration without their consent. *Miller v. Lewis*, 103 Miss. 598, 60 So. 654 (1913).

2. Execution, issuance of.

Where injunction to restrain execution on money decree was dissolved, execution could issue against sureties on injunction-bond for amount of decree. *Russ v. Stockstill*, 155 Miss. 368, 124 So. 359 (1929).

Execution could issue within seven years after dissolution of decree enjoining execution on money decree, though original decree was barred. *Russ v. Stockstill*, 155 Miss. 368, 124 So. 359 (1929).

Execution may be issued under judgment against injunction bond, regardless of alleged error of clerk in ordering execution under prior barred judgment. *Stockstill v. Campbell*, 145 Miss. 528, 111 So. 93 (1927).

Dissolution of injunction against proceedings at law on judgment for money has the force and effect of a judgment against the obligors on the bond and execution may be issued against them for the amount of the judgment enjoined. *Steadman v. Butler*, 95 Miss. 695, 49 So. 614 (1909).

RESEARCH REFERENCES

Am Jur. 42 Am. Jur. 2d, Injunctions §§ 185-218.

14 Am. Jur. Pl & Pr Forms (Rev), In-

junctions, Forms 61-66 (Bond or other security).

CJS. 43 C.J.S., Injunctions §§ 41-59.

§ 11-13-35. Damages on dissolution of certain injunctions.

When an injunction, obtained to stay proceedings on a judgment at law for money, shall be dissolved, in whole or in part, damages at the rate of five per centum shall be added to the judgment enjoined, or to so much thereof as shall

be found due, including the costs; and the clerk of the chancery court shall certify such dissolution to the clerk of the court in which the judgment was rendered, who shall thereupon issue execution for the damages, as well as for the original debt and costs. Damages at the same rate shall be allowed upon the dissolution of injunctions to stay sales under deeds of trust, or mortgages with power of sale; and such damages may be added to the debt, and collected by the sale of the property, or execution may issue from the chancery court for the same, together with the costs of suit, unless the value of the property, the sale of which was restrained, be less than the amount of the debt, in which case the damages shall be computed on the value of the property, to be ascertained and determined by the chancellor. In all cases upon the dissolution of an injunction, the damages may be ascertained by the court or chancellor, or upon reference to a master, and proof, if necessary, and decree therefor be made, and execution be issued thereon.

SOURCES: Codes, Hutchinson's 1848, ch. 54, arts. 2(41), 19(8); Laws, 1957, ch. 62, art. 72; 1871, § 1051; 1880, § 1918; 1892, § 572; Laws, 1906, § 623; Hemingway's 1917, § 383; Laws, 1930, § 432; Laws, 1942, § 1352.

Cross References — Procedural rules applicable to civil actions, see Miss. R. Civ. P. 1 et seq.

Injunctions, see Miss. R. Civ. P. 65.

JUDICIAL DECISIONS

1. In general.
2. Dissolution as to proceedings at law.
3. Dissolution as to sale under deed of trust or mortgage.
4. Computation of damages.
5. Execution, issuance* of.

1. In general.

Although in exceptional cases actual damages may be allowed in lieu of statutory damages upon dissolution of a temporary injunction, the defendants cannot recover both statutory damages and actual damages; for their recovery is limited either to one or the other. *Eubanks v. W.H. Hodges & Co.*, 207 So. 2d 640 (Miss. 1968).

Where no injunction is issued this section [Code 1942, § 1352] is inapplicable, and the defendant is not entitled to the allowance of an attorney's fee. *Giles v. Desporte Ins. Agency, Inc.*, 253 Miss. 190, 175 So. 2d 616 (1965).

Mortgagee under deed of trust was not entitled to 5 per cent damages under this section [Code 1942, § 1352] upon dissolution of injunction against foreclosure as to lands properly belonging to mortgagor, where, because not all the land not owned

by mortgagor had been deleted from the deed of trust and the proposed foreclosure would include land not owned by the mortgagor, the injunction was retained against such contingency. *Barcroft v. Armstrong*, 198 Miss. 565, 21 So. 2d 817 (1945).

Appellees were entitled to a writ of injunction to prevent foreclosure of security only upon condition that they give the injunction bond required by law, conditioned for the payment of the damages allowed by this section [Code 1942, § 1352] in the event of dissolution. *Federal Land Bank v. Brumfield*, 185 Miss. 487, 187 So. 522 (1939).

Dismissal of bill establishes that injunction was wrongfully sued out, and that defendant is entitled to damages sustained by issuing of injunction. *Johnson v. Howard*, 167 Miss. 475, 141 So. 573 (1932).

Court's lack of jurisdiction to grant injunction held no defense in action on injunction bond. *Johnson v. Howard*, 167 Miss. 475, 141 So. 573 (1932).

That defendants were not damaged, but were only restrained from proceeding in

unlawful manner, held no defense in action on injunction bond. *Johnson v. Howard*, 167 Miss. 475, 141 So. 573 (1932).

Liability of plaintiff upon dissolution of injunction is limited to amount of bond. *Staple Cotton Coop. Ass'n v. Borodofsky*, 143 Miss. 585, 108 So. 807 (1926).

Damages should not be awarded if at the time the injunction was obtained the complainant was entitled to the writ. *Burroughs v. Jones*, 79 Miss. 214, 30 So. 605 (1901).

Where the statutory damages are claimed and allowed, they are exclusive of all other damages; if in exceptional cases actual damages are allowed, the statutory damages cannot be. *Williams v. Bank of Commerce*, 71 Miss. 858, 16 So. 238 (1894); *Nixon v. Seal*, 78 Miss. 363, 29 So. 399 (1900).

2. Dissolution as to proceedings at law.

Defendants, on securing dissolution of injunction involving right to approval of appeal bond superseding judgments of justice of peace, were entitled to counsel fees. *Renaldo v. Lamas*, 151 Miss. 207, 117 So. 528 (1928).

No attorney's fee allowable for defending judgment in injunction suit on appeal. *Smith v. Perkins*, 125 Miss. 203, 88 So. 531 (1921).

This section [Code 1942, § 1352] provides for recovery of damages, including costs, on partial dissolution of an injunction staying proceedings on money judgment at law. *Courtney Bros. v. John Deere Plow Co.*, 122 Miss. 232, 84 So. 185 (1920), motion granted, 122 Miss. 611, 84 So. 690 (1920).

The section [Code 1942, § 1352] applies exclusively to injunctions sued out by parties to the judgment and only attorney's fees can be allowed where the injunction is sued out by a stranger to the judgment before final decree. *Armstrong v. Fusz*, 16 So. 532 (Miss. 1894).

3. Dissolution as to sale under deed of trust or mortgage.

The chancellor erred in denying five percent damages upon dissolving an injunction which enjoined the foreclosure of a deed of trust. *James v. Jackson Prod. Credit Ass'n*, 389 So. 2d 494 (Miss. 1980).

In awarding damages upon the dissolution of an injunction staying a foreclosure sale under a deed of trust, the total damages allowable under this section was 5 per cent of the debt, and it was error to allow in addition an attorney's fee of \$200, for no other damages than statutory damages will be allowed when delay and costs have been the only injury. *Giles v. Hengen*, 206 So. 2d 626 (Miss. 1968).

Where a sale under a trust deed is enjoined, though not threatened and incapable by the terms of the deed of being made for two years, an attorney's fee is not allowable. *Wynne v. Mason*, 72 Miss. 424, 18 So. 422 (1895).

The statutory damages are allowed whether the injunction be sued out by a party to the instrument or by a stranger. If by the latter they may when awarded be collected by execution. *Williams v. Bank of Commerce*, 71 Miss. 858, 16 So. 238 (1894); *Nixon v. Seal*, 78 Miss. 363, 29 So. 399 (1900).

Where an injunction to restrain a sale under a trust deed is dissolved, the statutory damages should be awarded, notwithstanding an appeal to settle the principles of the case is allowed with supersedeas. The five per cent damages are not allowable where the injunction is to prevent a sale by a commissioner in chancery, although under a decree foreclosing a trust deed. *Fox v. Miller*, 71 Miss. 598, 14 So. 145 (1893).

4. Computation of damages.

Following the dissolution of a preliminary injunction enjoining the foreclosure of a deed of trust, a chancellor properly imposed damages under § 11-13-35 amounting to 5 percent of the entire principal debt secured by the deed of trust, rather than 5 percent of the collateral debt which prompted the foreclosure. *Kelso v. McGowan*, 604 So. 2d 726 (Miss. 1992).

In proceedings to enjoin the foreclosure of a deed of trust, the contention that no valid injunction ever issued because of Code 1942, § 1352, providing that when an injunction obtained to stay sales under deeds of trust has been dissolved, damages shall be included in the costs awarded, because the preliminary injunction bond was insufficient, was moot

where the court made the injunction permanent and the question of the assessment of damages on the bond would not occur. *Carl v. Craft*, 258 So. 2d 237 (Miss. 1972), overruled on other grounds, *Tide-way Oil Programs v. Serio*, 431 So. 2d 454 (Miss. 1983).

On dissolution of an injunction to stay a sale under a deed of trust, the trustee is entitled to damages in the amount of 5% of the amount realized from the sale of the property. *Hans v. Wiesenburg*, 237 Miss. 351, 114 So. 2d 849 (1959).

Where there was a final judgment rendered against sureties on "replevin bond," the amount of judgment being for \$500 and costs, but where an injunction was obtained staying proceedings at law on the judgment and also enjoining the sale of property under execution on the judgment, and where the writ of injunction was dissolved by the Supreme Court, the judgment creditor was entitled to the above judgment with legal interest, together with five per cent as damages, and

to all costs in all courts. *Murdock Acceptance Corp. v. Smith*, 222 Miss. 594, 76 So. 2d 688 (1955), corrected, 222 Miss. 608, 77 So. 2d 727 (1955).

Damages on dissolution of injunction should be assessed on value of property in case value is less than debt. *Coleman v. People's Bank*, 146 Miss. 496, 112 So. 686 (1927).

The declaration in a suit on the bond for five per cent damages on the debt secured by the trust deed, a sale under which was enjoined, is demurrable if it fails to allege that the value of the property was not less than such debt. *Barber v. Levy*, 73 Miss. 484, 18 So. 797 (1895).

5. Execution, issuance of.

Execution may issue under judgment against injunction bond, regardless of alleged error of clerk in ordering execution under prior barred judgment. *Stockstill v. Campbell*, 145 Miss. 528, 111 So. 93 (1927).

RESEARCH REFERENCES

Am Jur. 42 Am. Jur. 2d, Injunctions §§ 337-360.

14 Am. Jur. Pl & Pr Forms (Rev), Injunctions, Forms 111-119 (Action for wrongful issuance of injunction; recovery on injunction bond).

13 Am. Jur. Legal Forms 2d, Mortgages § 179:456.2.

CJS. 43 C.J.S., Injunctions §§ 314-342.

§ 11-13-37. Post-injunction damages.

Where the party claiming damages shall desire, upon the dissolution of an injunction, to have the same ascertained and decreed by the chancellor or the chancery court, he shall suggest in writing, on the hearing of the motion to dissolve the injunction, the nature and amount of the damages; and the chancellor or court shall hear evidence, if necessary, and assess the damages, and decree the same to the party entitled thereto, for which execution may be issued, as in other cases, against the obligors in the bond given for the injunction. And if the chancellor, instead of hearing evidence as to said damages — which may be by witnesses examined before him in vacation or in term time, or by deposition, according to the circumstances — shall see proper, he may make a reference to a master to take testimony and report in such matter. But nothing herein contained shall prevent the party entitled from maintaining a suit on the injunction bond, if his damages shall not be assessed as herein provided for.

SOURCES: Codes, 1880, § 1919; 1892, § 573; Laws, 1906, § 624; Hemingway's 1917, § 384; Laws, 1930, § 433; Laws, 1942, § 1353.

Cross References — Injunctions, see Miss. R. Civ. P. 65.

JUDICIAL DECISIONS

1. In general.
2. Claim for damages.
3. On appeal.
4. Independent action on bond.
5. Award of damages.
6. —Measure of damages.
7. —Attorney fees.

1. In general.

Renewal lessee of rural school lands was entitled to recover damages against the original lessee who held over under an injunction after the expiration of the original lease, where the renewal lessee was compelled to pay a monthly rental which would have been avoided had he not been enjoined from occupying the premises. *Smith v. Young*, 199 Miss. 658, 24 So. 2d 746 (1946), suggestion of error sustained in part, 199 Miss. 658, 25 So. 2d 136 (1946).

Dismissal of suit in which temporary injunction had been issued entitled defendants to damages on the bond. *Alexander v. Woods*, 115 Miss. 164, 75 So. 772 (1917).

If the bill is solely for an injunction, damages should be at once awarded upon its dissolution. *Derdeyn v. Donovan*, 81 Miss. 696, 33 So. 652 (1902).

Dismissal of bill establishes that injunction was wrongfully sued out, and that defendant is entitled to damages sustained by issuing of injunction. *Yale v. Baum*, 70 Miss. 225, 11 So. 879 (1892); *Johnson v. Howard*, 167 Miss. 475, 141 So. 573 (1932).

2. Claim for damages.

Where defendant has answered and claimed specified damages, he is entitled to have them established in that suit and cannot be deprived of this right by the voluntary dismissal by complainant of the bill. *Canadian & Am. Mtg. & Trust Co. v. Fitzpatrick*, 71 Miss. 347, 14 So. 270 (1893).

3. On appeal.

Since there is no provision authorizing the Supreme Court to initially hear and

take evidence on a motion for the allowance of damages on the dissolution of an injunction and to fix and award such damages where no award of damages on the dissolution of the injunction has been made in the lower court, a motion for the allowance of damages was overruled. *Machine Prods. Co. v. Prairie Local Lodge No. 1538*, 230 Miss. 809, 95 So. 2d 763 (1957), overruled on other grounds, *IP Timberlands Operating Co. v. Denmiss Corp.*, 726 So. 2d 96 (Miss. 1998).

Damages for wrongful issuance of injunction may be allowed on appeal. *Brooks-Scanlon Co. v. Stogner*, 114 Miss. 736, 75 So. 596 (1917).

4. Independent action on bond.

Court's lack of jurisdiction to grant injunction held no defense in action on injunction bond. *Johnson v. Howard*, 167 Miss. 475, 141 So. 573 (1932).

That defendants were not damaged, but were only restrained from proceeding in unlawful manner, held no defense in action on injunction bond. *Johnson v. Howard*, 167 Miss. 475, 141 So. 573 (1932).

Members of political party could sue as individuals for expenses incurred as result of wrongful issuance of injunction restraining holding of primary elections and conventions. *Johnson v. Howard*, 167 Miss. 475, 141 So. 573 (1932).

Expenses not shown to be necessary and not properly separated from expenses incurred before issuance of injunction could not be allowed in action on injunction bond. *Johnson v. Howard*, 167 Miss. 475, 141 So. 573 (1932).

Action on injunction bond does not lie until final decree dismissing bill. *Vicksburg Waterworks Co. v. City of Vicksburg*, 99 Miss. 132, 54 So. 852, *Am. Ann. Cas.* 1913D,917 (1911).

Actions on injunction-bonds are not maintainable until the final disposition of the causes in which they were given. *Yazoo & Miss. V. Ry. v. Adams*, 78 Miss. 977, 30 So. 44 (1901).

The right to sue at law on the bond is not affected by the failure of the chancery court to assess damages. *Barber v. Levy*, 73 Miss. 484, 18 So. 797 (1895).

If proof of damages claimed under the statute be insufficient, it is not error to disallow the claim without prejudice to a suit on the bond. *Davis v. Hart*, 66 Miss. 642, 6 So. 318 (1889).

The section [Code 1942, § 1353] does not authorize an independent suit on the bond before final decree. *Goodbar & Co. v. Dunn*, 61 Miss. 624 (1884).

5. Award of damages.

Damages may be awarded on bond upon dissolution of injunction where injunction is only relief sought, but where injunction is merely ancillary, award of damages should await termination of suit. *Staple Cotton Coop. Ass'n v. Borodofsky*, 139 Miss. 368, 104 So. 91 (1925).

Upon dissolution of injunction restraining execution sale of personalty, personal decree should not be rendered against obligors on injunction bond for amount of the judgment or debt, but only for such damages as defendant may have sustained. *Gotelli v. Fountain*, 127 Miss. 577, 90 So. 250 (1922).

A decree dissolving an injunction and awarding damages is interlocutory. *Wilson v. Pugh*, 61 Miss. 449 (1884).

6. —Measure of damages.

This section [Code 1942, § 1353], in providing that a person enjoined could have his damages ascertained in the proceeding in which the injunction was granted, does not allow an additional security for damages over and above the face amount of the bond. *Broome v. Hattiesburg Bldg. & Trades Council*, 206 So. 2d 184 (Miss. 1967).

Damages from injunction preventing delivery of lumber is difference in value when injunction sued out and when dissolved, with interest on the difference for intervening period. *Thornton-Claney Lumber Co. v. J.M. O'Quin & Sons*, 115 Miss. 857, 76 So. 732 (1917).

7. —Attorney fees.

Chancellor was well within his authority to award attorney's fees and damages to property owners where the city initi-

ated the action to have the owners remove the fence from their own property, and the owners were forced to hire attorneys, hire surveyors, and incur expenses, while doing nothing to violate the city's rights; thus, the city was responsible for the expenses the owners incurred. *City of Waynesboro v. McMichael*, 856 So. 2d 474 (Miss. Ct. App. 2003).

When injunction is sought as ancillary remedy to other relief and hearing on injunction is not had upon motion to dissolve separate and apart from hearing upon merits, no counsel fees will be allowed. *Coleman v. Lucas*, 206 Miss. 274, 39 So. 2d 879 (1949), error overruled 206 Miss. 274, 41 So. 2d 54.

When whole relief sought is controlled by injunction and any incidental relief flows from and is dependent upon retaining injunction, allowance of solicitor's fees upon dissolution of injunction is entirely proper. *Coleman v. Lucas*, 206 Miss. 274, 39 So. 2d 879 (1949), error overruled 206 Miss. 274, 41 So. 2d 54.

Solicitor's fees are not properly awarded where injunction is ancillary to other relief asked and where the entire matter is heard upon the merits. *Smith v. Young*, 199 Miss. 658, 24 So. 2d 746 (1946), suggestion of error sustained in part, 199 Miss. 658, 25 So. 2d 136 (1946).

Supreme Court was without power to transfer an award of solicitor's fees erroneously awarded on dissolution of injunction in suit by former lessee of rural school lands to compel reopening of the matter of a renewal lease of the same lands granted to another, as a credit upon actual damages sustained by the renewal lessee by virtue of the injunction, even though such damages were erroneously disallowed by the trial court. *Smith v. Young*, 199 Miss. 658, 24 So. 2d 746 (1946), suggestion of error sustained in part, 199 Miss. 658, 25 So. 2d 136 (1946).

Defendant was not entitled to attorney's fees even though dissolution of an injunction was procured, where the suit was both for injunctive relief and the recovery of damages, and the motion to dissolve the injunction was not heard in advance of the trial on the merits. *Capital Elec. Power Ass'n v. Franks*, 199 Miss. 226, 23 So. 2d 922 (1945).

Allowance to county law enforcement officers of counsel fees in the sum of \$800 in final decree dissolving injunction against the holding of an election to determine whether the transportation, etc. of wines and beer should be excluded from the county, did not constitute an abuse of discretion. *Sparks v. Reddoch*, 196 Miss. 609, 18 So. 2d 450 (1944).

Amount of solicitor's fees in dissolving wrongful injunction is left to chancellor's discretion. *New Orleans, M. & C.R. Co. v. Martin*, 105 Miss. 230, 62 So. 228 (1913); *Sparks v. Reddoch*, 196 Miss. 609, 18 So. 2d 450 (1944).

Where complainant, a construction company, filed a bill in chancery to obtain an injunction against a city to prevent its awarding a construction contract to another construction firm because the complainant was the lowest and best bidder, and also filed an application with a supreme court judge to issue a temporary injunction to preserve the status quo until the time of the hearing, at the same time also obtaining a restraining order of the chancery court, and at the hearing before the supreme court judge the application for temporary injunction was denied, and thereafter a bill of complaint in the chancery court was dismissed in view of the fact that the city had in the meantime awarded the contract to the complainant, the allowance to the city of attorney's fees as damages arising out of the suit for the temporary injunction and dissolution thereof was erroneous. *Edward E. Morgan Co. v. City of Natchez*, 188 Miss. 781, 196 So. 251 (1940).

Attorney's fees not element of defendant's damages for wrongful issuance of injunction merely ancillary to relief sought in bill of complaint. *Staple Cotton Coop. Ass'n v. Buckley*, 141 Miss. 483, 106 So. 747 (1926).

Attorney's fees not allowed where dissolution of injunction not sought until trial on merits. *Howell v. McLeod*, 127 Miss. 1, 89 So. 774 (1921).

Attorney's fees not allowable on dissolution of injunction to enforce illegal agreement. *Lowenburg v. Klein*, 125 Miss. 284, 87 So. 653 (1921).

Attorney's fees for defending suit on merits not allowable as damages when injunction is a mere incident thereto. *Mims v. Swindle*, 124 Miss. 686, 87 So. 151 (1921); *Hunter v. Hankinson*, 141 Miss. 279, 106 So. 514 (1925).

Attorney's fees recoverable for wrongful suing out of injunction do not include services in assessing damages after dissolution of the injunction. *Thornton-Claney Lumber Co. v. J.M. O'Quin & Sons*, 115 Miss. 857, 76 So. 732 (1917).

Upon dissolution of injunction against foreclosure of trust deed obtained after advertisement, defendant was entitled to recover counsel fee and printer's fees for the advertisement. *Gulfport Land & Imp. Co. v. Augur*, 95 Miss. 292, 48 So. 722 (1909).

Upon dissolution of injunction, defendant entitled to attorney's fees for services in both trial and appellate courts. *Curphy & Mundy v. Terrell*, 89 Miss. 624, 42 So. 235 (1906).

RESEARCH REFERENCES

ALR. Necessary defendants in independent action on injunction bond. 55 A.L.R.2d 545.

Recovery of damages resulting from wrongful issuance of injunction as limited to amount of bond. 30 A.L.R.4th 273.

Am Jur. 42 Am. Jur. 2d, Injunctions §§ 337-360.

14 Am. Jur. Pl & Pr Forms (Rev), Injunctions, Forms 111-119 (Action for wrongful issuance of injunction; recovery on injunction bond).

CJS. 43 C.J.S., Injunctions §§ 314-342.

§ 11-13-39. Effect of dissolution of injunction on bill of complaint.

When, on motion, an injunction shall be wholly dissolved, the bill of complaint shall be dismissed of course with costs, unless sufficient cause be shown against its dismissal at the next succeeding term of the court.

SOURCES: Codes, Hutchinson's 1848, ch. 54, art. 2(40); 1857, ch. 62, art. 69; 1871, § 1048; 1880, § 1917; 1892, § 570; Laws, 1906, § 621; Hemingway's 1917, § 381; Laws, 1930, § 434; Laws, 1942, § 1354.

Cross References — Injunctions, see Miss. R. Civ. P. 65.

JUDICIAL DECISIONS

1. In general.
2. Time for dismissal.
3. Appeal.

1. In general.

It is error, on dissolving injunction on motion and demurrer to bill, to at once enter judgment on injunction bond. *Bullen v. Smith*, 146 Miss. 316, 111 So. 454 (1927).

An order dissolving an injunction, on motion for that purpose, does not of itself dismiss the bill. *Pickle v. Holland*, 24 Miss. 566 (1852).

2. Time for dismissal.

Dismissal of complaint upon sustaining demurrer thereto and dissolving injunction held not prejudicial. *Evans v. Money*, 104 Miss. 264, 61 So. 309 (1913).

Where the bill is filed solely for an injunction, the dissolution of the injunction carries with it the dismissal of the bill. Otherwise, the bill is retained until final hearing. *Derdeyn v. Donovan*, 81 Miss. 696, 33 So. 652 (1902).

The object of the statute is to give the complainant an opportunity to amend or

to take further proof; but where the case is disposed of on its merits, both sides having taken their proofs, the case can be dismissed at once. *Bass v. Nelms*, 56 Miss. 502 (1879).

On mere motion to dissolve, on bill and answer, it is error, on sustaining the motion, to dismiss the bill at once. *Drane v. Winter*, 41 Miss. 517 (1867); *Guion v. Pickett*, 42 Miss. 77 (1868); *Maury v. Smith*, 46 Miss. 81 (1871).

3. Appeal.

Strong v. Harrison, 62 Miss. 61 (1884).

Decree directing dismissal of bill in vacation on sustaining demurrer held not prejudicial, where decision on demurrer practically amounted to final disposition, and appellants declined to amend or plead further, but prayed for and were granted appeal. *Edward Hines Yellow Pine Trustees v. Knox*, 144 Miss. 560, 108 So. 907 (1926).

Decree vacating temporary injunction and dismissing bill was final and appealable. *Anderson v. Henderson*, 103 Miss. 211, 60 So. 137 (1912).

RESEARCH REFERENCES

CJS. 43 C.J.S., Injunctions § 278.

CHAPTER 15

Arbitration and Award

In General	11-15-1
Arbitration of Controversies Arising from Construction Contracts and Related Agreements	11-15-101

IN GENERAL

SEC.	
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11-15-35.	Pending suits may be arbitrated.
11-15-37.	Construction of chapter.

§ 11-15-1. Who may submit to arbitration.

All persons, except infants and persons of unsound mind, may, by instrument of writing, submit to the decision of one or more arbitrators any controversy which may be existing between them, which might be the subject of an action, and may, in such submission, agree that the court having jurisdiction of the subject matter shall render judgment on the award made pursuant to such submission. In such case, however, should the parties agree upon a court without jurisdiction of the subject matters of the award, the judgment shall be rendered by the court having jurisdiction in the county of the residence of the party, or some one of them, against whom the award shall be made.

SOURCES: Codes, 1892, § 95; Laws, 1906, § 96; Hemingway's 1917, § 83; Laws, 1930, § 81; Laws, 1942, § 279.

Cross References — Definition of the term "infant," see § 1-3-21.

Arbitration of controversies arising from construction contracts and related agreements generally, see §§ 11-15-101 et seq.

Inapplicability of this section to certain agreements, see § 11-15-143.

Partition of property by arbitration, see § 11-21-1.

Arbitration of motor vehicle dealer contracts, see § 63-17-133.

Arbitration with state highway department, see § 65-1-91.

JUDICIAL DECISIONS

1. In general.
2. Subjects of arbitration.
3. Persons who may submit to arbitration.
4. Jurisdiction of courts.
5. Revocation of submission before award.

1. In general.

An arbitrator is not required to make separate or detailed findings as to the reasons for an arbitration award. When parties agree to arbitration, they contract for an award without a formal, reasoned opinion and, more specifically, without findings of fact or conclusions of law. Absent a contractual agreement to the contrary, the parties waive any right to an explanation or clarification. *Craig v. Barber*, 524 So. 2d 974 (Miss. 1988).

Declaration in suit on award in arbitration which alleges the material facts in reference thereto, and makes as exhibits the contract, the agreement to arbitrate and award thereon, held to state cause of action. *Stout v. W.M. Garrard & Co.*, 128 Miss. 418, 91 So. 33 (1922).

The legal effect of arbitration agreement and finding therein is to make a compromise settlement of the matters in dispute, and the effect thereof is to merge the original causes of action and defenses into the written award and make that the conclusive source of rights and liabilities of the parties. *Yarbro v. Purser*, 114 Miss. 75, 74 So. 425 (1917).

In action on contract it was error to exclude arbitration agreement and finding of arbitrators. *Yarbro v. Purser*, 114 Miss. 75, 74 So. 425 (1917).

2. Subjects of arbitration.

Arbitrators, being the chosen judges of the parties, are, in general, to be deemed judges of the law as well as the facts applicable to the case submitted to them; and in the absence of a reservation in the submission, the parties are presumed to agree that every question both as to law and fact necessary for the decision is to be

included in the arbitration. *Memphis & C.R.R. v. Scruggs*, 50 Miss. 284 (1874).

Whether the arbitrators exceeded their power in making an award involves the question of what power was conferred upon them by the agreement of submission. *Memphis & C.R.R. v. Scruggs*, 50 Miss. 284 (1874).

3. Persons who may submit to arbitration.

Parties to a construction agreement, as a matter of right to contract, may in advance bind themselves to compulsory arbitration of disputes that arise between them. *Herrin v. Milton M. Stewart, Inc.*, 558 So. 2d 863 (Miss. 1990).

The guardian may submit the controversy of his ward in matters in which he is authorized to give acquittances. *Goleman v. Turner*, 22 Miss. (14 S. & M.) 118 (1850); *McComb v. Turner*, 22 Miss. (14 S. & M.) 119 (1850).

The guardian may submit the controversy of his ward in matters in which he is authorized to give acquittances. *Goleman v. Turner*, 22 Miss. (14 S. & M.) 118 (1850); *McComb v. Turner*, 22 Miss. (14 S. & M.) 119 (1850).

A guardian ad litem cannot bind his ward by submitting the suit to arbitration. *Fort v. Battle*, 21 Miss. (13 S. & M.) 133 (1849).

An attorney at law, as such, has no power to submit his client's controversy which is not in suit to arbitration. *Jenkins v. Gillespie*, 18 Miss. (10 S. & M.) 31, 48 Am. Dec. 732 (1848).

4. Jurisdiction of courts.

The jurisdiction of a court of equity to enforce specific performance of awards involves the exercise of its ordinary jurisdiction as applied to the specific performance of agreements and not the exercise of any jurisdiction peculiar to awards, and accordingly many, if not all, the principles applicable to ordinary suits of that nature must apply. *Memphis & C.R.R. v. Scruggs*, 50 Miss. 284 (1874).

While a court of equity will not interfere to enforce an award involving merely the payment of money, there being an adequate remedy at law in such case, a court of equity has jurisdiction to enforce specific execution of an award concerning real estate or of an agreement for the purchase and sale of real estate, notwithstanding that it involves the enforcement of an award to pay money. *Memphis & C.R.R. v. Scruggs*, 50 Miss. 284 (1874).

5. Revocation of submission before award.

Chancery court erred in ordering specific enforcement of a clause in a collective bargaining agreement between a company and the union which provided for arbitration of future disputes, since the effect of the company's refusal to submit

the matters to arbitration was to revoke the arbitration clause insofar as it applied to the disputes involved in the action. *Machine Prods. Co. v. Prairie Local Lodge No. 1538*, 230 Miss. 809, 95 So. 2d 763 (1957), overruled on other grounds, *IP Timberlands Operating Co. v. Denmiss Corp.*, 726 So. 2d 96 (Miss. 1998).

Either party to a written agreement for submission to arbitration has the right to revoke the submission before award is made, regardless of whether the submission was by deed, or that the agreement contained a provision against revocability, or that valuable consideration was given for the agreement. *Jones v. Harris*, 59 Miss. 214 (1881), overruled on other grounds, *IP Timberlands Operating Co. v. Denmiss Corp.*, 726 So. 2d 96 (Miss. 1998).

ATTORNEY GENERAL OPINIONS

There is no requirement that a binding arbitration provision be incorporated as a part of a standard insurance policy form. *Dale*, March 17, 2000, A.G. Op. #2000-0100.

A metropolitan sewer authority is not a person as defined by § 1-3-39 and, therefore, is not capable of entering into agreements for binding arbitration under § 11-15-1. *Clark*, Apr. 26, 2002, A.G. Op. #02-0184.

The West Rankin Metropolitan Sewer Authority does not have specific authority in its enabling legislation or general legislation to enter into binding arbitration agreements; however, it may seek amendment of the local and private act by the legislature to include the authority to enter into binding arbitration agreements in specific circumstances. *Clark*, June 7, 2002, A.G. Op. #02-0295.

RESEARCH REFERENCES

ALR. Conclusiveness of statement or decision of accountant or similar third person under contract between others requiring property to be valued by him. 50 A.L.R.2d 1268.

Constitutionality of arbitration statutes. 55 A.L.R.2d 432.

Death of party before award as revocation or termination of submission to arbitration. 63 A.L.R.2d 754.

Arbitration of disputes within close corporation. 64 A.L.R.2d 643.

Application of provisions of arbitration statutes excluding contracts for labor or services. 64 A.L.R.2d 1336.

Disqualification of arbitrator by court or stay of arbitration proceedings for inter-

est, bias, prejudice, collusion, or fraud of arbitrators. 65 A.L.R.2d 755.

Necessity that arbitrators, make specific or detailed findings of fact or conclusions of law. 82 A.L.R.2d 969.

Enforcement of contractual arbitration clause as affected by expiration of contract prior to demand for arbitration. 5 A.L.R.3d 1008.

Validity and effect, and remedy in respect, of contractual stipulation to submit disputes to arbitration in another jurisdiction. 12 A.L.R.3d 892.

Validity and construction of provision for arbitration of disputes as to alimony for support payments, or child visitation or custody matters. 18 A.L.R.3d 1264.

Breach or repudiation of contract as affecting right to enforce arbitration clause therein. 32 A.L.R.3d 377.

Comment Note: Determination of validity of arbitration award under requirement that arbitrators shall pass on all matters submitted. 36 A.L.R.3d 649.

Demand for or submission to arbitration as affecting enforcement of mechanics' lien. 73 A.L.R.3d 1042.

Filing of mechanics' lien or proceeding for its enforcement as affecting right to arbitration. 73 A.L.R.3d 1066.

Admissibility of affidavit or testimony of arbitrator to impeach or explain award. 80 A.L.R.3d 155.

Statute of limitations as bar to arbitration under agreement. 94 A.L.R.3d 533.

Conflict of laws as to validity and effect of arbitration provision in contract for purchase or sale of goods, products, or services. 95 A.L.R.3d 1145.

Defendant's participation in action as waiver of right to arbitration of dispute involved therein. 98 A.L.R.3d 767.

Appealability of state court's order or decree compelling or refusing to compel arbitration. 6 A.L.R.4th 652.

Claim of fraud in inducement of contract as subject to compulsory arbitration clause contained in contract. 11 A.L.R.4th 774.

Attorney's submission of dispute to arbitration, or amendment of arbitration agreement, without client's knowledge or consent. 48 A.L.R.4th 127.

Which statute of limitations applies to efforts to compel arbitration of a dispute. 77 A.L.R.4th 1071.

Arbitration agreement or other private contract as precluding filing of unfair labor practice charges with National Labor Relations Board. 6 A.L.R. Fed. 272.

Am Jur. 4 Am. Jur. 2d, Alternative Dispute Resolution §§ 47-66.

2 Am. Jur. Pl & Pr Forms (Rev), Arbitration And Award, Forms 1 et seq.

2 Am. Jur. Legal Forms 2d, Arbitration and Award §§ 23:21 et seq. (future disputes; agreements and contract provisions).

2 Am. Jur. Legal Forms 2d, Arbitration and Award §§ 23:31 et seq. (Future disputes).

2 Am. Jur. Legal Forms 2d, Arbitration and Award §§ 23:111 et seq. (present disputes; submission).

2 Am. Jur. Legal Forms 2d, Arbitration and Award §§ 23:121-23:143, 23:161-23:165 (Present disputes).

2A Am. Jur. Legal Forms 2d, Arbitration and Award § 23:134 (present disputes-filing agreement for arbitration with clerk of appropriate court).

2 Am. Jur. Legal Forms 2d, Arbitration and Award § 23:354 (Awards).

27 Am. Jur. Trials 621, Resolving Real Estate Disputes Through Arbitration.

44 Am. Jur. Trials 507, Alternative Dispute Resolution: Commercial Arbitration.

46 Am. Jur. Trials 231, Alternative Dispute Resolution for Banks and Other Financial Institutions.

CJS. 6 C.J.S., Arbitration § 10.

Law Reviews. An Overview of Mississippi's Construction Arbitration Act. 53 Miss. L. J. 501, September, 1983.

§ 11-15-3. Qualifications of arbitrators.

A person shall not act as an arbitrator where he is interested in the subject matter in dispute, nor where he is related, by consanguinity or affinity, to any of the parties to the arbitration.

SOURCES: Codes, 1892, § 96; Laws, 1906, § 97; Hemingway's 1917, § 84; Laws, 1930, § 82; Laws, 1942, § 280.

Cross References — Arbitration of controversies arising from construction contracts and related agreements generally, see §§ 11-15-101 et seq.

Inapplicability of this section to certain agreements, see § 11-15-143.

RESEARCH REFERENCES

Am Jur. 4 Am. Jur. 2d, Alternative Dispute Resolution §§ 154-162.

2 Am. Jur. Pl & Pr Forms (Rev), Arbitration And Award, Forms 51 et seq.

2 Am. Jur. Legal Forms 2d, Arbitration and Award § 23:238 (Arbitrators and umpires).

4 Am. Jur. Proof of Facts 2d, Bias of Arbitrator, §§ 8 et seq. (proof of bias of arbitrator).

CJS. 6 C.J.S., Arbitration §§ 63-64, 66.

§ 11-15-5. Arbitrators to appoint time of meeting and notify parties.

The arbitrators selected by agreement of the parties shall appoint a time and place for the hearing, and notify the parties thereof, and shall adjourn the hearing from time to time, as may be necessary, and on the application of either party, and for good cause may postpone the hearing to a time not extending beyond the day fixed in the submission, if a day be fixed, for rendering the award.

SOURCES: Codes, 1892, § 97; Laws, 1906, § 98; Hemingway's 1917, § 85; Laws, 1930, § 83; Laws, 1942, § 281.

Cross References — Arbitration of controversies arising from construction contracts and related agreements generally, see §§ 11-15-101 et seq.

Inapplicability of this section to certain agreements, see § 11-15-143.

RESEARCH REFERENCES

ALR. Allowance, in replevin action, of loss of profits from deprivation of use of detained property. 48 A.L.R.2d 1053.

Am Jur. 2 Am. Jur. Legal Forms 2d, Arbitration and Award § 23:281.5 (place of arbitration).

§ 11-15-7. Notice to parties; form.

The notice which the arbitrators shall give to the parties of the time and place of the hearing of the controversy shall be in writing, and may be in the following form, viz:

"To _____ and _____ and _____ [naming all of the parties]

"You are notified that the undersigned arbitrators, agreed upon by you to determine the controversy mentioned in your articles of submission, of date the _____ day of _____ A.D. _____, have fixed upon and will hear and consider your said controversy on the _____ day of _____ A.D. _____, at _____

"_____
 "_____
 "_____

"Arbitrators."

Such notice shall be served by delivering to each of the parties a copy thereof at least one whole day before the hearing, and shall be given to the

parties by one of the arbitrators, who shall indorse on said notice that he has served the same by giving the party or parties so served a true copy thereof; but, if the parties appear, the want of notice shall not affect the proceedings.

SOURCES: Codes, 1892, § 98; Laws, 1906, § 99; Hemingway's 1917, § 86; Laws, 1930, § 84; Laws, 1942, § 282.

Cross References — Arbitration of controversies arising from construction contracts and related agreements generally, see §§ 11-15-101 et seq.

Inapplicability of this section to certain agreements, see § 11-15-143.

JUDICIAL DECISIONS

1. In general.

Where the parties to an arbitration appeared by counsel at the hearing before the arbitrators, it is immaterial that the

record fails to show that they were notified to so appear. *Mississippi Cotton Oil Co. v. Buster*, 84 Miss. 91, 36 So. 146 (1904).

RESEARCH REFERENCES

Am Jur. 4 Am. Jur. 2d, Alternative and Award §§ 23:282, 23:283 (Hearing).
Dispute Resolutions §§ 177-190. **CJS.** 6 C.J.S., Arbitration §§ 83.
2 Am. Jur. Legal Forms 2d, Arbitration

§ 11-15-9. Arbitrators to be sworn.

Before proceeding to hear any testimony in relation to the matter, the arbitrators shall be sworn, by some officer authorized to administer an oath, to faithfully and impartially hear and determine the matters submitted to them, according to the evidence and the manifest justice and equity of the case, to the best of their judgment, without favor or affection.

SOURCES: Codes, 1892, § 99; Laws, 1906, § 100; Hemingway's 1917, § 87; Laws, 1930, § 85; Laws, 1942, § 283.

Cross References — Arbitration of controversies arising from construction contracts and related agreements generally, see §§ 11-15-101 et seq.

Inapplicability of this section to certain agreements, see § 11-15-143.

RESEARCH REFERENCES

Am Jur. 4 Am. Jur. 2d, Alternative and Award §§ 23:261 et seq. (Arbitrators
Dispute Resolution § 179. and umpires).
2 Am. Jur. Legal Forms 2d, Arbitration **CJS.** 6 C.J.S., Arbitration § 67.

§ 11-15-11. Arbitrators' meetings; procedure.

All arbitrators must meet together and hear all of the allegations and evidence of the parties pertinent or material to the cause; but the parties may mutually waive, in writing, the appearance of all of the arbitrators named in the articles of submission and consent for those present to proceed, or they may, in like manner, substitute other persons for the absent one. An award

made, and every other act done, by a majority of the arbitrators shall be valid, unless the concurrence of all or a certain number of the arbitrators to the award or acts be expressly required in the submission.

SOURCES: Codes, 1892, § 100; Laws, 1906, § 101; Hemingway's 1917, § 88; Laws, 1930, § 86; Laws, 1942, § 284.

Cross References — Arbitration of controversies arising from construction contracts and related agreements generally, see §§ 11-15-101 et seq.

Inapplicability of this section to certain agreements, see § 11-15-143.

JUDICIAL DECISIONS

1. In general.

All arbitrators must participate, but majority may make award. *Stout v. W.M. Garrard & Co.*, 128 Miss. 418, 91 So. 33 (1922).

On matters agreed to be submitted to three arbitrators, an award made on the investigation of only two is void. *Harvin v.*

Denton, 87 Miss. 238, 39 So. 456 (1905).

Whether the arbitrators exceeded their power in making an award involves the question of what power was conferred upon them by the agreement of submission. *Memphis & C.R.R. v. Scruggs*, 50 Miss. 284 (1874).

RESEARCH REFERENCES

ALR. Refusal of arbitrators to receive evidence, or to permit briefs or arguments, on particular issues as grounds for relief from award. 75 A.L.R.3d 132.

Modern status of rules respecting concurrence of all arbitrators as condition of

binding award under private agreement not specifying unanimity. 83 A.L.R.3d 996.

Am Jur. 4 Am. Jur. 2d, Alternative Dispute Resolution §§ 191 et seq.

CJS. 6 C.J.S., Arbitration §§ 81, 95.

§ 11-15-13. Swearing of witnesses.

All witnesses before arbitrators shall be sworn as if before a court, and the parties shall have the benefit of legal process to compel the attendance of witnesses, which may be issued by the clerk of any court or a justice of the peace, and shall require the witness to attend before the arbitrators on a day and at a place certain to be named in the subpoena.

SOURCES: Codes, 1892, § 101; Laws, 1906, § 102; Hemingway's 1917, § 89; Laws, 1930, § 87; Laws, 1942, § 285.

Editor's Note — Pursuant to Miss. Const. Art. 6, § 171, all reference in the Mississippi Code to justice of the peace shall mean justice court judge.

Cross References — Arbitration of controversies arising from construction contracts and related agreements generally, see §§ 11-15-101 et seq.

Inapplicability of this section to certain agreements, see § 11-15-143.

RESEARCH REFERENCES

Am Jur. 2 Am. Jur. Pl & Pr Forms (Rev), Arbitration and Award, Forms 61 et seq.

CJS. 6 C.J.S., Arbitration § 87.

§ 11-15-15. Service of process.

Process returnable to the arbitrators may be served as provided for in the Mississippi Rules of Civil Procedure.

SOURCES: Codes, 1892, § 102; Laws, 1906, § 103; Hemingway's 1917, § 90; Laws, 1930, § 88; Laws, 1942, § 286; Laws, 1991, ch. 573, § 31, eff from and after July 1, 1991.

Cross References — Arbitration of controversies arising from construction contracts and related agreements generally, see §§ 11-15-101 et seq.

Inapplicability of this section to certain agreements, see § 11-15-143.

RESEARCH REFERENCES

ALR. Patient's failure to reveal medical history to physician as contributory negligence or assumption of risk in defense of malpractice action. 33 A.L.R.4th 790.

§ 11-15-17. Contempt.

If any person duly subpoenaed to appear before arbitrators and testify, shall fail to do so, he shall be guilty of contempt of the court from which, or by whose clerk, the process issued, and upon complaint thereto of the party injured, the court or justice may punish the person for such contempt as in other like cases.

SOURCES: Codes, 1892, § 103; Laws, 1906, § 104; Hemingway's 1917, § 91; Laws, 1930, § 89; Laws, 1942, § 287.

Cross References — Arbitration of controversies arising from construction contracts and related agreements generally, see §§ 11-15-101 et seq.

Inapplicability of this section to certain agreements, see § 11-15-143.

RESEARCH REFERENCES

ALR. Patient's failure to reveal medical history to physician as contributory negligence or assumption of risk in defense of malpractice action. 33 A.L.R.4th 790.

§ 11-15-19. Award enforcement process.

To entitle an award to be enforced according to the provisions of this chapter, it must be made in writing, and be signed by the arbitrators making the same and who concur therein. The arbitrators shall attach to the award the articles of submission, the notice served on the parties, with indorsements of service, and, if the parties appear, that fact should be noted in the award itself; and they shall give a duplicate of the whole to each of the parties to the controversy, and the duplicates shall each be treated as originals.

SOURCES: Codes, 1892, § 104; Laws, 1906, § 105; Hemingway's 1917, § 92; Laws, 1930, § 90; Laws, 1942, § 288.

Cross References — Arbitration of controversies arising from construction contracts and related agreements generally, see §§ 11-15-101 et seq.

Inapplicability of this section to certain agreements, see § 11-15-143.

JUDICIAL DECISIONS

1. In general.

The award is an extinguishment of all causes of action submitted. *Jones v. Harris*, 58 Miss. 293 (1880).

Where the arbitrators reduce their findings to writing and sign them in each other's presence at the same time and place, it is competent for counsel to agree that the award so drawn may afterwards be put in proper form, and in such case it is no objection to the formal award that it was not signed by the arbitrators at the same time and place. *Jones v. Harris*, 58 Miss. 293 (1880).

It is essential to the validity of an award that it shall be final and complete, responsive to all the matters of difference in-

cluded in the submission. (Said of a common law award.) *Rhodes v. Hardy*, 53 Miss. 587 (1876).

In a mobile home owner's suit over alleged defects in materials and workmanship, although no document entitled "articles of submission" was in the record or the procedure for affirming the arbitrator's award in favor of the mobile home seller, manufacturer, and creditor, the substance of each requirement of Miss. Code Ann. § 11-15-19 (1972) was found within the record and the findings of fact the arbitrator submitted to the trial court. *Margerum v. Bud's Mobile Homes, Inc.*, 823 So. 2d 1167 (Miss. 2002).

RESEARCH REFERENCES

Am Jur. 2 Am. Jur. Pl & Pr Forms (Rev ed), Arbitration and Award, Form 91.01 (Award; subsequent proceedings).

2 Am. Jur. Legal Forms 2d, Arbitration and Award §§ 23:341 et seq. (awards).

CJS. 6 C.J.S., Arbitration § 101.

§ 11-15-21. Confirmation of award by court.

Upon presentation of the articles of submission and the award to the court designated in the submission or the court having jurisdiction of the subject matter of the award, the court shall, upon motion, confirm the award, unless the same be vacated or modified, or a decision thereon be postponed, as hereinafter provided. An award shall not be confirmed unless notice in writing of such motion shall have been served on the adverse party at least five days before the hearing, to be served as other process; but such motion shall not be made after the expiration of one year from the making and publication of the award.

SOURCES: Codes, 1892, § 105; Laws, 1906, § 106; Hemingway's 1917, § 93; Laws, 1930, § 91; Laws, 1942, § 289.

Cross References — Arbitration of controversies arising from construction contracts and related agreements generally, see §§ 11-15-101 et seq.

Inapplicability of this section to certain agreements, see § 11-15-143.

JUDICIAL DECISIONS

1. In general.

In a mobile home owner's suit over alleged defects in materials and workmanship, although no document entitled "articles of submission" was in the record or the procedure for affirming the arbitrator's award in favor of the mobile home

seller, manufacturer, and creditor, the substance of each requirement of Miss. Code Ann. § 11-15-19 (1972) was found within the record and the findings of fact the arbitrator submitted to the trial court. *Margerum v. Bud's Mobile Homes, Inc.*, 823 So. 2d 1167 (Miss. 2002).

RESEARCH REFERENCES

ALR. Demand for or submission to arbitration as affecting enforcement of mechanics' lien. 73 A.L.R.3d 1042.

Am Jur. 2 Am. Jur. Pl & Pr Forms (Rev), Arbitration And Award, Forms 101 et seq.

2 Am. Jur. Legal Forms 2d, Arbitration and Award § 23:371 (awards).

CJS. 6 C.J.S., Arbitration § 120.

§ 11-15-23. Vacation of award; grounds.

Any party complaining of an award may move the court to vacate the same upon any of the following grounds:

(a) That such award was procured by corruption, fraud, or undue means;

(b) That there was evident partiality or corruption on the part of the arbitrators, or any one of them;

(c) That the arbitrators were guilty of misconduct in refusing to postpone the hearing upon sufficient cause shown, or in refusing to hear evidence pertinent or material to the controversy, or other misbehavior by which the rights of the party shall have been prejudiced;

(d) That the arbitrators exceeded their powers, or that they so imperfectly executed them that a mutual, final, and definite award on the subject matter was not made.

SOURCES: Codes, 1892, § 106; Laws, 1906, § 107; Hemingway's 1917, § 94; Laws, 1930, § 92; Laws, 1942, § 290.

Cross References — Motion to vacate award, see § 11-15-27.

Arbitration of controversies arising from construction contracts and related agreements generally, see §§ 11-15-101 et seq.

Inapplicability of this section to certain agreements, see § 11-15-143.

Prohibition against arbitrators accepting bribes, see § 97-9-5.

JUDICIAL DECISIONS

1. In general.

2. Specific grounds for vacating award.

3. Impeachment of award.

1. In general.

It is not legitimate, in exceptions to an arbitration award, to inquire into the orig-

inal merits in favor of one party or the other, or to show that in evidence the award ought to have been different or that the law of the case was misconceived or misapplied, or that the decision, in view of all the facts and circumstances, was unjust. Thus, the scope of judicial review is much narrower than in cases where a party challenges the evidentiary basis for a trial court's decision. *Herrin v. Milton M. Stewart, Inc.*, 558 So. 2d 863 (Miss. 1990).

Only grounds for setting an arbitration award aside are grounds prescribed by this section [Code 1942, § 290]. *Hutto v. Jordan*, 204 Miss. 30, 36 So. 2d 809 (1948).

Nothing in an award relative to merits of controversy as submitted, however wrongly decided, whether errors of law or fact, is ground for setting aside an award in the absence of fraud, misconduct or other valid objections as defined in this section [Code 1942, § 290] and Code 1942, § 291. *Hutto v. Jordan*, 204 Miss. 30, 36 So. 2d 809 (1948).

Either party to a written agreement for submission to arbitration has the right to revoke the submission before award is made, regardless of whether the submission was by deed, or that the agreement contained a provision against revocability, or that valuable consideration was given for the agreement. *Jones v. Harris*, 59 Miss. 214 (1881), overruled on other

grounds, *IP Timberlands Operating Co. v. Denmiss Corp.*, 726 So. 2d 96 (Miss. 1998).

2. Specific grounds for vacating award.

Arbitration award will not be vacated except for prejudicial misconduct of arbitrators. *McClendon v. Stewart*, 133 Miss. 253, 97 So. 547 (1923).

On motion to vacate award involving determination to the ownership of a note, evidence was insufficient to sustain finding that party to arbitration, a lady sixty-eight years old and weak mentally and physically, was overreached in the assignment of the note and in the arbitration award. *McClendon v. Stewart*, 133 Miss. 253, 97 So. 547 (1923).

An award of arbitrators unsanctioned by the court, which was made through fraud, will not be enforced. *Elledge v. Polk*, 48 So. 241 (Miss. 1909).

The arbitrators must consider everything submitted to them and if they refuse to do so, the award is not binding. (This was a common-law award.) *Tucker v. Gordon*, 8 Miss. (7 Howard) 306 (1843).

3. Impeachment of award.

It is not competent to impeach an award by the testimony of an arbitrator who executed the same. *Tucker v. Gordon*, 8 Miss. (7 Howard) 306 (1843).

RESEARCH REFERENCES

ALR. Arbitrator's viewing or visiting premises or property alone as misconduct justifying vacation of award. 27 A.L.R.2d 1160.

Arbitrator's consultation with outsider or outsiders as misconduct justifying vacation of award. 47 A.L.R.2d 1362.

Setting aside arbitration award on ground of interest or bias of arbitrators. 56 A.L.R.3d 697.

Refusal of arbitrators to receive evidence, or to permit briefs or arguments, on particular issues as grounds for relief from award. 75 A.L.R.3d 132.

Admissibility of affidavit or testimony of arbitrator to impeach or explain award. 80 A.L.R.3d 155.

What constitutes corruption, fraud, or undue means in obtaining arbitration

award justifying avoidance of award under state law. 22 A.L.R.4th 366.

Am Jur. 4 Am. Jur. 2d, Alternative Dispute Resolution Award §§ 234-256 et seq.

2 Am. Jur. Pl & Pr Forms (Rev), Arbitration And Award, Forms 141 et seq.

2 Am. Jur. Legal Forms 2d, Arbitration and Award § 23:361 (awards).

4 Am. Jur. Proof of Facts 2d, Bias of Arbitrator, §§ 8 et seq. (proof of bias of arbitrator).

27 Am. Jur. Proof of Facts 3d 103, Establishing Statutory Grounds to Vacate an Arbitration Award in Nonjudicial Arbitration.

CJS. 6 C.J.S., Arbitration §§ 149, 150-153, 167.

§ 11-15-25. Correction of award.

Any party to the submission may also move the court to modify or correct the award in the following cases:

(a) Where there is an evident miscalculation of figures, or an evident mistake in the description of any person, thing, or property referred to in such award;

(b) Where the arbitrators shall have awarded upon some matter not submitted to them, nor affecting the merits of the decision of the matter submitted;

(c) Where the award shall be imperfect in some matter of form, not affecting the merits of the controversy, and when, if it had been a verdict of a jury rendered in such court, the defect could have been amended or disregarded by the court.

SOURCES: Codes, 1892, § 107; Laws, 1906, § 108; Hemingway's 1917, § 95; Laws, 1930, § 93; Laws, 1942, § 291.

Cross References — Arbitration of controversies arising from construction contracts and related agreements generally, see §§ 11-15-101 et seq.

Inapplicability of this section to certain agreements, see § 11-15-143.

JUDICIAL DECISIONS

1. In general.

Only grounds for modifying an arbitration award are grounds prescribed by this section [Code 1942, § 291]. *Hutto v. Jordan*, 204 Miss. 30, 36 So. 2d 809 (1948).

Nothing in an award relative to merits of controversy as submitted, however wrongly decided, whether errors of law or fact, is ground for setting aside an award in the absence of fraud, misconduct or other valid objections as defined in this section [Code 1942, § 291] and Code 1942, § 290. *Hutto v. Jordan*, 204 Miss. 30, 36 So. 2d 809 (1948).

Fact that installment payment notes totaled more than unpaid balance, the time purchase price of automobile, does

not prove misdescription of time price of miscalculation of interest to support a motion for modification of award where excess over time price is explained by phrase, "including interest and carrying charges." *Hutto v. Jordan*, 204 Miss. 30, 36 So. 2d 809 (1948).

For a case in which a mistake in the computation of time in awarding party the price of his labor was corrected without a statute, see *Robertson v. Wells*, 28 Miss. 90 (1854).

The award should be in accordance with the submission and not extend to subjects not submitted nor to strangers. *Gibson v. Powell*, 13 Miss. (5 S. & M.) 712 (1846).

RESEARCH REFERENCES

ALR. Power of court to resubmit matter to arbitrators for correction or clarification, because of ambiguity or error in, or omission from, arbitration award. 37 A.L.R.3d 200.

Admissibility of affidavit or testimony of arbitrator to impeach or explain award. 80 A.L.R.3d 155.

Am Jur. 4 Am. Jur. 2d, Alternative Dispute Resolution §§ 234-256.

2 Am. Jur. Pl & Pr Forms (Rev), Arbitration And Award, Forms 131 et seq.

CJS. 6 C.J.S., Arbitration § 168.

§ 11-15-27. Motion to vacate or modify award; when made.

An application to vacate or modify an award shall be made to the court at the term next after the making and publication of the award, upon at least five days' notice, in writing, being given to the adverse party, if there be time for that purpose; and if there be not time, such court, or the judge thereof, may, upon good cause shown, order a stay of proceedings upon the award, either absolutely or upon such terms as shall appear just, until the next succeeding term of court.

SOURCES: Codes, 1892, § 108; Laws, 1906, § 109; Hemingway's 1917, § 96; Laws, 1930, § 94; Laws, 1942, § 292.

Cross References — Causes for vacation of award, see § 11-15-23.

Modification and correction of award, see § 11-15-25.

Arbitration of controversies arising from construction contracts and related agreements generally, see §§ 11-15-101 et seq.

Inapplicability of this section to certain agreements, see § 11-15-143.

JUDICIAL DECISIONS**1. In general.**

Mississippi statute of limitations for actions to vacate arbitration awards (§ 11-15-27) will not be applied in action seeking to vacate arbitration award under Labor Management Relations Act (29 USCS § 1985) where action has been filed in federal court in Tennessee and Tennessee has unambiguous statute of limitations for analogous cause of action, in contrast to § 11-15-27 which is ambiguous and uncertain to point of frustration. *Champion Int'l Corp. v. United Paperworkers Int'l Union*, 779 F.2d 328 (6th Cir. Tenn. 1985).

In an action brought by a truck driver under the Labor Management Relations Act to challenge an arbitration decision upholding his discharge, § 11-15-27 was properly applied even though the arbitration award had not been signed in accordance with the requirements for the signing of arbitration awards under Mississippi law, since the arbitration took place under federal law, and the only state law applicable was the statute of limitations, not state procedural requirements. *Rigby v. Roadway Express, Inc.*, 680 F.2d 342 (5th Cir. 1982).

RESEARCH REFERENCES

ALR. Arbitrator's viewing or visiting premises or property alone as misconduct justifying vacation of award. 27 A.L.R.2d 1160.

Time for impeaching arbitration award. 85 A.L.R.2d 779.

Am Jur. 2 Am. Jur. Pl & Pr Forms (Rev), Arbitration and Award, Forms 141 et seq (Award; subsequent proceedings).

2 Am. Jur. Legal Forms 2d, Arbitration and Award §§ 23:361, 23:362 (awards).

§ 11-15-29. Application to vacate or modify award; new hearing.

On application as provided for in Section 11-15-27, the court may vacate the award in any of the cases specified in Section 11-15-23, and if the time in which the award shall have been required to be made by the articles of

submission has not expired, may, in its discretion, direct a new hearing by the arbitrators; and, in the cases specified in Section 11-15-25, the court may modify and correct the award so as to effect the intent thereof, and to promote justice between the parties.

SOURCES: Codes, 1892, § 109; Laws, 1906, § 110; Hemingway's 1917, § 97; Laws, 1930, § 95; Laws, 1942, § 293.

Cross References — Arbitration of controversies arising from construction contracts and related agreements generally, see §§ 11-15-101 et seq.

Inapplicability of this section to certain agreements, see § 11-15-143.

JUDICIAL DECISIONS

1. In general.

It is not legitimate, in exceptions to an arbitration award, to inquire into the original merits in favor of one party or the other, or to show that in evidence the award ought to have been different or that the law of the case was misconceived or misapplied, or that the decision, in view of all the facts and circumstances, was unjust. Thus, the scope of judicial review is much narrower than in cases where a

party challenges the evidentiary basis for a trial court's decision. *Herrin v. Milton M. Stewart, Inc.*, 558 So. 2d 863 (Miss. 1990).

Nothing in an award relative to merits of controversy as submitted, however wrongfully decided, whether errors of law or fact, is ground for setting aside an award in the absence of fraud, misconduct or other valid objections as defined in Code 1942, §§ 290 and 291. *Hutto v. Jordan*, 204 Miss. 30, 36 So. 2d 809 (1948).

RESEARCH REFERENCES

ALR. Arbitrator's viewing or visiting premises or property alone as misconduct justifying vacation of award. 27 A.L.R.2d 1160.

Power of arbitrator to correct, or power of court to correct or resubmit, non-labor award because of incompleteness or failure to pass on all matters submitted. 36 A.L.R.3d 939.

Filing of mechanics' lien or proceeding

for its enforcement as affecting right to arbitration. 73 A.L.R.3d 1066.

Refusal of arbitrators to receive evidence, or to permit briefs or arguments, on particular issues as grounds for relief from award. 75 A.L.R.3d 132.

Am Jur. 27 Am. Jur. Proof of Facts 3d 103, Establishing Statutory Grounds to Vacate an Arbitration Award in Nonjudicial Arbitration.

§ 11-15-31. Judgments; when and how rendered.

Upon such award being confirmed or modified, the court shall render such judgment therein in favor of the party entitled to the same, as would be rendered in such case in the circuit or chancery court.

SOURCES: Codes, 1892, § 110; Laws, 1906, § 111; Hemingway's 1917, § 98; Laws, 1930, § 96; Laws, 1942, § 294.

Cross References — Arbitration of controversies arising from construction contracts and related agreements generally, see §§ 11-15-101 et seq.

Inapplicability of this section to certain agreements, see § 11-15-143.

JUDICIAL DECISIONS

1. In general.

An award may be binding on a portion of the parties and not on all of them, as where the distributees of an estate some of whom were infants, on the one side and

the administrator on the other submitted a controversy about the administration to arbitrators, the award was held to bind the adults but not the infants. *Fort v. Battle*, 21 Miss. (13 S. & M.) 133 (1849).

§ 11-15-33. Costs; how taxed and collected.

The costs of the proceedings, after an application to the court for its action upon the award, and the fees allowed by law to the arbitrators, where no provision for payment is made thereof in the award, shall be taxed and collected as in other suits.

SOURCES: Codes, 1892, § 111; Laws, 1906, § 112; Hemingway's 1917, § 99; Laws, 1930, § 97; Laws, 1942, § 295.

Cross References — Arbitration of controversies arising from construction contracts and related agreements generally, see §§ 11-15-101 et seq.

Inapplicability of this section to certain agreements, see § 11-15-143.

Compensation for referees, auditors, and arbitrators, see § 25-7-35.

RESEARCH REFERENCES

ALR. Liability of parties to arbitration for costs, fees, and expenses. 57 A.L.R.3d 633.

Am Jur. 2 Am. Jur. Legal Forms 2d,

Arbitration and Award § 23:166 (Present disputes).

CJS. 6 C.J.S., Arbitration §§ 179 et seq.

§ 11-15-35. Pending suits may be arbitrated.

In all suits or actions in any court, it shall be lawful for the plaintiff and defendant to consent to a rule of court referring all matters in controversy between them in such suit or action to the arbitrament of any person or persons who may be mutually chosen by them; and the award of such arbitrators being made and returned according to the rule of submission of the parties, approved by the court and entered of record, shall have the same effect as the final judgment or decree of the court into which such award may be returned, and execution may issue thereon accordingly; and like proceedings may be had, where applicable, as is provided in other cases.

SOURCES: Codes, 1892, § 112; Laws, 1906, § 113; Hemingway's 1917, § 100; Laws, 1930, § 98; Laws, 1942, § 296.

Cross References — Arbitration of controversies arising from construction contracts and related agreements generally, see §§ 11-15-101 et seq.

Inapplicability of this section to certain agreements, see § 11-15-143.

JUDICIAL DECISIONS

1. In general.
2. Conclusiveness of award.

1. In general.

Agreement to submit controversy to arbitration has effect of compromise settlement of matters in dispute and this agreement merges original causes of action and defenses into written award and makes that the exclusive source of rights and liabilities of parties. *Hutto v. Jordan*, 204 Miss. 30, 36 So. 2d 809 (1948).

But the regular guardian may so submit a controversy in which he is authorized to give an acquittance. *Goleman v. Turner*, 22 Miss. (14 S. & M.) 118 (1850).

A guardian ad litem cannot bind his ward by submitting the suit to arbitration. *Fort v. Battle*, 21 Miss. (13 S. & M.) 133 (1849).

2. Conclusiveness of award.

Nothing in an award relative to merits of controversy as submitted, however wrongly decided, whether errors of law or fact, is ground for setting aside an award in the absence of fraud, misconduct or other valid objections as defined in Code 1942, §§ 290 and 291. *Hutto v. Jordan*, 204 Miss. 30, 36 So. 2d 809 (1948).

Unless arbitrators are restricted by agreement of submission, they are final judges of both law and fact and an award will not be reviewed or set aside for mistake in either. *Hutto v. Jordan*, 204 Miss. 30, 36 So. 2d 809 (1948).

Parties to a replevin action who have agreed to submit to arbitrator issue involving usury are bound by whatever ar-

bitrators declare to be law between them, and award is final and conclusive. *Hutto v. Jordan*, 204 Miss. 30, 36 So. 2d 809 (1948).

An award returned into the circuit court by arbitrators appointed under this section [Code 1942, § 296] should be vacated when it appears that after the submission of the case the arbitrators heard the unsworn testimony of one party, in the absence of, and without the knowledge of the other or his counsel. *Rand v. Peel*, 74 Miss. 305, 21 So. 10 (1896).

On an appeal from an award returned into and approved by the circuit court, said award is dealt with by the Supreme Court in the matter of procedure as having the same effect as a final judgment of the trial court, and when set aside the submission falls with it. *Rand v. Peel*, 74 Miss. 305, 21 So. 10 (1896).

The objection that the circuit court could not render judgment on an award until the end of the term next following its return, is not well taken. Where the award was returned before the term of court began and plaintiff invited action upon it by making a motion in the case, the court rightly assumed that they were prepared to urge objections which they expected to make. *Hollingsworth v. Willis*, 64 Miss. 152, 8 So. 170 (1886).

Affidavits in support of a motion to set aside an award, which are referred to in the bill of exceptions but not there set out, will not be considered by the Supreme Court, though certain affidavits which appeared to be the same are set out elsewhere in the record. *Hollingsworth v. Willis*, 64 Miss. 152, 8 So. 170 (1886).

RESEARCH REFERENCES

ALR. Laches or statute of limitations as bar to arbitration under agreement. 37 A.L.R.2d 1125.

Contract providing that it is governed by or subject to rules or regulations of a particular trade, business, or association as incorporating agreement to arbitrate. 41 A.L.R.2d 872.

Validity and effect of arbitration agreement provision that, upon one party's failure to appoint arbitrator, controversy may

be determined by arbitrator appointed by other party. 47 A.L.R.2d 1346.

Liability of organization sponsoring or administering arbitration to parties involved in proceeding. 41 A.L.R.4th 1013.

Am Jur. 4 Am. Jur. 2d, Alternative Dispute Resolution §§ 47-66.

2 Am. Jur. Legal Forms 2d, Arbitration and Award §§ 23:121-23:143, 23:161-23:165 (Present disputes).

§ 11-15-37. Construction of chapter.

This chapter shall not be construed to take away from the courts of equity their power over awards, nor to make invalid any award good at common law. It shall be liberally construed for the encouragement of the settlement of disputes and the prevention of litigation.

SOURCES: Codes, 1892, § 113; Laws, 1906, § 114; Hemingway's 1917, § 101; Laws, 1930, § 99; Laws, 1942, § 297.

Cross References — Arbitration of controversies arising from construction contracts and related agreements generally, see §§ 11-15-101 et seq.

Inapplicability of this section to certain agreements, see § 11-15-143.

JUDICIAL DECISIONS

1. In general.

Arbitration proceedings which were had on subcontractor's request, where subcontractor was in default on a contract with state building commission, were an appeal from architect's determination and were broad enough to settle a dispute between the parties even though it was found only in general terms that architect's certificate should have been issued. *Horne v. State Bldg. Comm'n*, 222 Miss. 520, 76 So. 2d 356 (1954).

Articles of agreement to arbitrate and awards thereon are to be liberally construed so as to encourage settlement of disputes and prevention of litigation, and every reasonable presumption will be indulged in favor of validity of arbitration proceedings. *Hutto v. Jordan*, 204 Miss. 30, 36 So. 2d 809 (1948); *Stout v. W.M. Garrard & Co.*, 128 Miss. 418, 91 So. 33 (1922).

Agreement to submit controversy to ar-

bitration has effect of compromise settlement of matters in dispute and this agreement merges original causes of action and defenses into written award and makes that the exclusive source of rights and liabilities of parties. *Hutto v. Jordan*, 204 Miss. 30, 36 So. 2d 809 (1948).

A liberal construction of the arbitration statute was expressly provided doubtless with knowledge that ordinary articles of arbitration are prepared by parties having no knowledge of technical rules, and refinements ought not to be ingrafted by the courts upon such proceedings. *Stout v. W.M. Garrard & Co.*, 128 Miss. 418, 91 So. 33 (1922).

Policy of the state is to permit arbitration and give effect to a valid submission and award in view of this section [Code 1942, § 297]. *Scottish Union & Nat'l Ins. Co. v. Skaggs*, 114 Miss. 618, 75 So. 437 (1917).

RESEARCH REFERENCES

ALR. Validity and construction of provisions for arbitration of disputes as to alimony or support payments or child visitation or custody matters. 38 A.L.R.5th 69.

Am Jur. 3 Am. Jur. Trials 681, Tactics and Strategy of Pleading §§ 50 et seq.

ARBITRATION OF CONTROVERSIES ARISING FROM CONSTRUCTION CONTRACTS AND RELATED AGREEMENTS

SEC.

11-15-101. Agreements to which arbitration provisions apply.

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- 11-15-105. Application for order to proceed with arbitration; stay; determination of issues.
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- 11-15-137. Order and judgment on award; enforcement; costs.
- 11-15-139. Preparation of judgment roll; docketing judgment or decree.
- 11-15-141. Court actions from which appeal may be taken.
- 11-15-143. Inapplicability of other arbitration provisions.

§ 11-15-101. Agreements to which arbitration provisions apply.

(1) Sections 11-15-101 through 11-15-143 apply only to agreements and provisions for arbitration made subsequent to July 1, 1981.

(2) Sections 11-15-101 through 11-15-143 shall apply to any agreement for the planning, design, engineering, construction, erection, repair or alteration of any building, structure, fixture, road, highway, utility or any part thereof, and to any purchase by, or supply to, any contractor or subcontractor qualified to do business in this state of any materials to be used in the planning, design, engineering, construction, erection, repair or alteration of any building, structure, fixture, road, highway, utility or any part thereof; provided, however, that nothing contained in Sections 11-15-101 through 11-15-143 shall be construed as amending or otherwise affecting the provisions of Sections 65-2-1 through 65-2-17, section 65-1-89, Section 65-1-91, and Section 77-9-387, Mississippi Code of 1972.

(3) Sections 11-15-101 through 11-15-143 shall also apply to any agreement for architectural, engineering, surveying, planning and related professional services performed in connection with any of the agreements enumerated in subsection (2) of this section.

(4) Sections 11-15-101 through 11-15-143 shall have no effect on the establishment or enforcement of any lien provided for in Title 85, Chapter 7, Mississippi Code of 1972.

SOURCES: Laws, 1981, ch. 495, § 1, eff from and after July 1, 1981.

Editor's Note — Section 77-9-387 referred to in (2) was repealed by Laws, 1997, ch. 460, § 21, eff from and after July 1, 1997.

Cross References — Provisions on arbitration and award of controversies, see §§ 11-15-1 et seq.

Inapplicability of §§ 11-15-1 through 11-15-37 to agreements enumerated in this section, see § 11-15-143.

Application of the arbitration provisions of §§ 11-15-101 through 11-15-143 to disagreements between electric utility and person seeking to work in closer proximity to high voltage overhead lines than is permitted by law over the reasonableness or necessity of the price of or work to be performed to deter contact with the lines, see § 45-15-9.

ATTORNEY GENERAL OPINIONS

The University of Mississippi Medical Center may agree to contracts which provide that disputes arising out of and concerning the performance or nonperfor-

mance of those contracts be resolved by binding arbitration. Conerly, February 5, 1999, A.G. Op. #99-0026.

RESEARCH REFERENCES

ALR. Constitutionality of arbitration statutes. 55 A.L.R.2d 432.

Municipal corporation's power to submit to arbitration. 21 A.L.R.3d 569.

Demand for or submission to arbitration as affecting enforcement of mechanics' lien. 73 A.L.R.3d 1042.

Filing of mechanics' lien or proceeding for its enforcement as affecting right to arbitration. 73 A.L.R.3d 1066.

Enforcement of arbitration agreement contained in construction contract by or against nonsignatory. 100 A.L.R.5th 481.

Am Jur. 4 Am. Jur. 2d, Alternative Dispute Resolution §§ 24-27, 47-66.

52 Am. Jur. Trials 209, Alternative Dispute Resolution: Construction Industry.

CJS. 6 C.J.S., Arbitration §§ 5, 12.

Law Reviews. An overview of Mississippi's Construction Arbitration Act, 53 Miss. L. J. 501, September, 1983.

Williamson and Redfern, Lender liability in Mississippi: Part II loan commitments and agreements. 59 Miss. L. J. 71, Spring, 1989.

§ 11-15-103. Agreements to submit controversies to arbitration; refusal of binding arbitration provisions in public contracts.

Two (2) or more parties referred to in Section 11-15-101 may agree in writing to submit to arbitration any controversy existing between them at the time of the agreement, or they may include in a written contract a provision for the settlement by arbitration of any controversy thereafter arising between them relating to such contract or the failure or refusal to perform the whole or any part thereof. Such agreement or provision shall be valid, enforceable and irrevocable without regard to the justiciable character of the controversy. Provided, however, that in the event either party to such an agreement initiates litigation against the other with respect to such agreement, such arbitration provision shall be deemed waived unless asserted as a defense on or before the responding party is required to answer to such litigation. Whenever a provision for binding arbitration is included in the contract documents of a public contract, any bidder may refuse to accept such clause and shall so state on the bid document before entering into such public

contract, and such refusal shall not be cause to reject any bid on, or refuse the award of such public contract.

SOURCES: Laws, 1981, ch. 495, § 2, eff from and after July 1, 1981.

Cross References — Application of the arbitration provisions of §§ 11-15-101 through 11-15-143 to disagreements between electric utility and person seeking to work in closer proximity to high voltage overhead lines than is permitted by law over the reasonableness or necessity of the price of or work to be performed to deter contact with the lines, see § 45-15-9.

JUDICIAL DECISIONS

1. In general.

The statute does not provide the exclusive method by which a party may effectuate a waiver of a right to arbitration. *Scott Addison Constr., Inc. v. Lauderdale County Sch. Sys.*, 789 So. 2d 771 (Miss. 2001).

Parties to a construction agreement, as a matter of right to contract, may in advance bind themselves to compulsory arbitration of disputes that arise between them. *Herrin v. Milton M. Stewart, Inc.*, 558 So. 2d 863 (Miss. 1990).

ATTORNEY GENERAL OPINIONS

The University of Mississippi Medical Center may agree to contracts which provide that disputes arising out of and concerning the performance or nonperfor-

mance of those contracts be resolved by binding arbitration. *Conerly*, February 5, 1999, A.G. Op. #99-0026.

RESEARCH REFERENCES

ALR. Contract providing that it is governed by or subject to rules or regulations of a particular trade, business, or association as incorporating agreement to arbitrate. 41 A.L.R.2d 872.

Death of party before award as revocation or termination of submission to arbitration. 63 A.L.R.2d 754.

Arbitration of disputes within close corporation. 64 A.L.R.2d 643.

Application of provisions of arbitration statutes excluding contracts for labor or services. 64 A.L.R.2d 1336.

Enforcement of contractual arbitration clause as affected by expiration of contract prior to demand for arbitration. 5 A.L.R.3d 1008.

Validity and effect, and remedy in respect, of contractual stipulation to submit disputes to arbitration in another jurisdiction. 12 A.L.R.3d 892.

Validity and enforceability of provision for binding arbitration and waiver thereof. 24 A.L.R.3d 1325.

Breach or repudiation of contract as affecting right to enforce arbitration clause therein. 32 A.L.R.3d 377.

Statute of limitations as bar to arbitration under agreement. 94 A.L.R.3d 533.

Conflict of laws as to validity and effect of arbitration provision in contract for purchase or sale of goods, products, or services. 95 A.L.R.3d 1145.

Attorney's submission of dispute to arbitration, or amendment of arbitration agreement, without client's knowledge or consent. 48 A.L.R.4th 127.

Am Jur. 4 Am. Jur. 2d, Alternative Dispute Resolution §§ 70-125.

2A Am. Jur. Legal Forms 2d, Arbitration and Award § 23:134 (present disputes-filing agreement for arbitration with clerk of appropriate court).

CJS. 6 C.J.S., Arbitration §§ 7, 13 et seq.

§ 11-15-105. Application for order to proceed with arbitration; stay; determination of issues.

(1) Any party to an agreement or provision for arbitration subject to Sections 11-15-101 through 11-15-143 claiming the neglect or refusal of another party thereto to comply therewith may make application to the court as described in Sections 11-15-133 and 11-15-135 for an order directing the parties to proceed with arbitration in accordance with the terms of such agreement or provision. If the court finds that no substantial issue exists as to the making of the agreement or provision, it shall grant the application. If the court shall find that a substantial issue is raised as to the making of the agreement or provision, it shall summarily hear and determine such issue and shall, consistent with such determination, grant or deny the application.

(2) Any action or proceeding involving an issue subject to arbitration under Sections 11-15-101 through 11-15-143 shall be stayed if an order for arbitration or an application therefor has been made under this section. If such issue is severable, the stay may be with respect to such issue only. An order for arbitration shall include the stay.

(3) On application, the court may stay an arbitration proceeding commenced or threatened if it shall find no agreement or provision for arbitration subject to Sections 11-15-101 through 11-15-143 exists between the party making the application and the party causing the arbitration to be had. The court shall summarily hear and determine the issue of the making of the agreement or provision and shall, consistent with such determination, grant or deny the application.

(4) An order for arbitration shall not be refused on the ground that the claim in issue lacks merit or bona fides or because any fault or grounds for the claim sought to be arbitrated have not been shown.

SOURCES: Laws, 1981, ch. 495, § 3, eff from and after July 1, 1981.

Cross References — Application of the arbitration provisions of §§ 11-15-101 through 11-15-143 to disagreements between electric utility and person seeking to work in closer proximity to high voltage overhead lines than is permitted by law over the reasonableness or necessity of the price of or work to be performed to deter contact with the lines, see § 45-15-9.

RESEARCH REFERENCES

ALR. Which statute of limitations applies to efforts to compel arbitration of a dispute. 77 A.L.R.4th 1071.

Am Jur. 4 Am. Jur. 2d, Alternative Dispute Resolution §§ 70-125.

2A Am. Jur. Legal Forms 2d, Arbitration and Award § 23:134 (present disputes-filing agreement for arbitration with clerk of appropriate court).

CJS. 6 C.J.S., Arbitration §§ 55-57, 81.

§ 11-15-107. Initiation of arbitration.

If an agreement or provision for arbitration provides a method for the initiation of arbitration, such method shall be followed. In the absence thereof,

the party desiring to initiate the arbitration shall, within the time specified by the contract, if any, file with the other party a notice of an intention to arbitrate which notice shall contain a statement setting forth the nature of the dispute, the amount involved, and the remedy sought. A party upon whom the demand for arbitration is made may file an answering statement to the other party within twenty (20) days after receipt of the initial demand. If no answer is filed within the stated time, it will be treated as a denial of the claim. Failure to file an answer shall not operate to delay the arbitration.

SOURCES: Laws, 1981, ch. 495, § 4, eff from and after July 1, 1981.

Cross References — Provision regarding form of applications and notices, see § 11-15-127.

RESEARCH REFERENCES

ALR. Delay in asserting contractual right to arbitration as precluding enforcement thereof. 25 A.L.R.3d 1171.

Attorney's submission of dispute to arbitration, or amendment of arbitration agreement, without client's knowledge or consent. 48 A.L.R.4th 127.

Which statute of limitations applies to efforts to compel arbitration of a dispute. 77 A.L.R.4th 1071.

Am Jur. 7 Am. Jur. Pl & Pr Forms (Rev), Contracts, Form 12.1 (Answer — Defense — Laches).

CJS. 6 C.J.S., Arbitration §§ 39 et seq.

§ 11-15-109. Appointment of arbitrators.

If an agreement or provision for arbitration provides a method for the appointment of arbitrators this method shall be followed. In the absence thereof, or if the agreed method fails or for any reason cannot be followed, or if an arbitrator who has been appointed fails or is unable to act and his successor has not been duly appointed, the court, on application of a party to such agreement or provision, shall appoint one or more arbitrators. An arbitrator so appointed shall have the same powers as if he had been named or provided for in the agreement or provision.

SOURCES: Laws, 1981, ch. 495, § 5, eff from and after July 1, 1981.

Cross References — Criminal penalty for arbitrator taking bribe, see § 97-9-5.

RESEARCH REFERENCES

ALR. Disqualification of arbitrator by court or stay of arbitration proceedings for interest, bias, prejudice, collusion, or fraud of arbitrators. 65 A.L.R.2d 755.

Setting aside arbitration award on ground of interest or bias of arbitrators. 56 A.L.R.3d 697.

Validity and effect under state law of arbitration agreement provision for alternative method of appointment of arbitrator where one party fails or refuses to follow appointment procedure specified in agreement. 75 A.L.R.5th 595.

Am Jur. 4 Am. Jur. 2d, Alternative Dispute Resolution §§ 148-176.

2 Am. Jur. Legal Forms 2d, Arbitration and Award §§ 23:212 et seq. (Appointment of arbitrator).

2 Am. Jur. Legal Forms 2d, Arbitration and Award §§ 23:253, 23:254 (Compensation of arbitrator).

4 Am. Jur. Proof of Facts 2d, Bias of Arbitrator, §§ 8 et seq. (proof of bias of arbitrator).

CJS. 6 C.J.S., Arbitration §§ 78-101.

§ 11-15-111. Powers of arbitrators to be exercised by majority.

The powers of the arbitrators may be exercised by a majority of their number unless otherwise provided in the agreement or provision for arbitration.

SOURCES: Laws, 1981, ch. 495, § 6, eff from and after July 1, 1981.

JUDICIAL DECISIONS**1. In general.**

When a mortgagee brings an action for a deficiency judgment on mortgaged property that the mortgagee purchased at a foreclosure sale in which the mortgagee was the only bidder, subsequent valuations of the property and the totality of the

actions taken by the creditor/purchaser at the foreclosure sale to satisfy the full debt from the property foreclosed becomes relevant to the entitlement of the mortgagee to a deficiency judgment, and therefore should be admissible. *Federal Land Bank v. Wolfe*, 560 So. 2d 137 (Miss. 1989).

RESEARCH REFERENCES

ALR. Modern status of rules respecting concurrence of all arbitrators as condition of binding award under private agreement not specifying unanimity. 83 A.L.R.3d 996.

Am Jur. 4 Am. Jur. 2d, Alternative Dispute Resolution §§ 163-172.

CJS. 6 C.J.S., Arbitration §§ 89, 90.

§ 11-15-113. Time, place and notice of hearing; procedure for conduct of hearing.

Unless otherwise provided by the agreement or provision for arbitration:

(a) The arbitrators so appointed shall set a time and place for the hearing and cause notification to the parties to be served personally in any manner provided for by law or by registered or certified mail not less than twenty (20) days before the hearing. Appearance at the hearing waives a party's right to such notice. The arbitrators may adjourn their hearing from time to time upon their own motion and shall do so upon the request of any party to the arbitration for good cause shown; provided that no adjournment or postponement of the hearing shall extend beyond the date fixed in the agreement or provision for making the award unless the parties consent to a later date.

(b) A hearing shall be opened by the recording of the place, time and date of the hearing, the presence of the arbitrator and parties, and counsel, if any, and by the receipt by the arbitrator of the statement of the claim and answer, if any.

The arbitrator may, at the beginning of the hearing, ask for a statement clarifying the issues involved.

The complaining party shall then present its claim, proofs and witnesses, who shall submit to questions or other examination. The defending party shall then present its defenses, proofs and witnesses, who shall submit to questions or other examination. The arbitrator may vary this procedure

but shall afford full and equal opportunity to the parties for the presentation of any material or relevant proofs.

Any party shall be entitled to cross-examine the witnesses of any other party appearing at the hearing. Exhibits, when offered by either party, may be received in evidence by the arbitrator.

The names and addresses of all witnesses and exhibits in order received shall be made a part of the record.

(c) The parties may offer such evidence as they desire and shall produce such additional evidence as the arbitrator may deem necessary to an understanding and determination of the dispute. The arbitrators shall be the judge of the admissibility of the evidence offered and conformity to legal rules of evidence shall not be necessary. All evidence shall be taken in the presence of all of the arbitrators and all of the parties, except where any of the parties is absent in default or has waived his or her right to be present.

(d) The hearing shall be conducted by all of the arbitrators but a majority may determine any question and render a final award. If, during the course of the hearing, an arbitrator for any reason ceases to act, the remaining arbitrator or arbitrators appointed to act as neutrals may continue with the hearing and determination of the controversy.

SOURCES: Laws, 1981, ch. 495, § 7, eff from and after July 1, 1981.

RESEARCH REFERENCES

ALR. Refusal or arbitrators to receive evidence, or to permit briefs or arguments, on particular issues as grounds for relief from award. 75 A.L.R.3d 132.

Am Jur. 4 Am. Jur. 2d, Alternative Dis-

pute Resolution Award §§ 177-217.

2 Am. Jur. Legal Forms 2d, Arbitration and Award §§ 23:282, 23:283 (Notice of hearing).

CJS. 6 C.J.S., Arbitration §§ 77-84.

§ 11-15-115. Representation by attorney at proceedings.

A party has the right to be represented by an attorney at any proceeding or hearing under Sections 11-15-101 through 11-15-143. A waiver thereof prior to the proceeding or hearing shall be ineffective.

SOURCES: Laws, 1981, ch. 495, § 8, eff from and after July 1, 1981.

§ 11-15-117. Subpoenas for production of evidence and attendance of witnesses; other discovery.

(1) The arbitrators may issue subpoenas for the attendance of witnesses and for the production of books, records, documents and other evidence and shall have the power to administer oaths. Subpoenas so issued shall be served and, upon application to the court by a party to the arbitration or the arbitrators, enforced in the manner provided by law for the service and enforcement of subpoenas in a civil action.

(2) On application of a party to the arbitration, the arbitrators, in the manner and upon terms designated by the arbitrators, may permit a deposition to be taken of any person.

(3) Any prehearing discovery other than that referred to above shall only be permissible if agreed to by the parties involved in the arbitration.

(4) All provisions of law compelling a person under subpoena to testify are applicable.

(5) Fees for attendance as a witness shall be the same as for a witness in circuit court.

SOURCES: Laws, 1981, ch. 495, § 9, eff from and after July 1, 1981.

Cross References — Issuance and service of subpoenas duces tecum, generally, see § 11-1-51.

Subpoenas for witnesses, generally, see §§ 13-3-93 et seq.

Fees for witness in circuit court, see § 25-7-47.

RESEARCH REFERENCES

Am Jur. 4 Am. Jur. 2d, Alternative Dispute Resolution §§ 189, 190.

81 Am. Jur. 2d, Witnesses §§ 7 et seq., 68 et seq.

2 Am. Jur. Pl & Pr Forms (Rev), Arbitration and Award, Form 61 (Petition or application by arbitrators for order compelling witness to attend arbitration proceeding).

2 Am. Jur. Pl & Pr Forms (Rev), Arbitration and Award, Form 62 (Order to

show cause why witness should not testify before arbitrators or be punished for contempt).

2 Am. Jur. Pl & Pr Forms (Rev), Arbitration and Award, Form 63 (Order directing witness to appear before arbitrators to testify).

CJS. 6 C.J.S., Arbitration §§ 85-87, 170-178.

97 C.J.S., Witnesses §§ 125-161.

§ 11-15-119. Nature of remedy; form and time of award.

(1) The arbitrators may grant any remedy or relief which is just, equitable and consistent with the agreement of the parties which is the subject of the arbitration.

(2) The award shall be in writing and shall be signed by the arbitrator joining in the award. The arbitrators shall deliver a copy to each party to the arbitration either personally or by registered or certified mail, or as provided in the agreement or provision.

(3) An award shall be made within the time fixed therefor by the agreement or provision for arbitration or, if not so fixed, within such time as the court may order on application of a party to the arbitration. The parties may, by written agreement, extend the time before or after the expiration thereof. A party waives the objection that an award was not made within the time required unless he notifies the arbitrators of his objection prior to the delivery of the award to him.

(4) An arbitrator may award attorney's fees and costs to a prevailing party.

SOURCES: Laws, 1981, ch. 495, § 10; Laws, 1994, ch. 626, § 8, eff from and after July 1, 1994.

RESEARCH REFERENCES

ALR. Necessity that arbitrators, make specific or detailed findings of fact or conclusions of law. 82 A.L.R.2d 969.

Power of court to resubmit matter to arbitrators for correction or clarification, because of ambiguity or error in, or omission from, arbitration award. 37 A.L.R.3d 200.

Construction and effect of contractual or statutory provisions fixing time within which arbitration award must be made. 56 A.L.R.3d 633.

Admissibility of affidavit or testimony of arbitrator to impeach or explain award. 80 A.L.R.3d 155.

Arbitrator's power to award punitive

damages. 83 A.L.R.3d 1037.

Equipment leasing expense as element of construction contractor's damages. 52 A.L.R.4th 712.

Am Jur. 4 Am. Jur. 2d, Alternative Dispute Resolution §§ 191 et seq.

2 Am. Jur. Legal Forms 2d, Arbitration and Award §§ 23:31 et seq. (Future disputes).

2 Am. Jur. Legal Forms 2d, Arbitration and Award §§ 23:121-23:143, 23:161-23:165 (Present disputes).

2 Am. Jur. Legal Forms 2d, Arbitration and Award § 23:341 (awards).

CJS. 6 C.J.S., Arbitration §§ 95-129.

§ 11-15-121. Fees and expenses.

Unless otherwise provided in the agreement or provision for arbitration, the arbitrators' reasonable expenses and fees, together with other reasonable expenses, not including counsel fees, incurred in the conduct of the arbitration shall be paid as provided in the award. Such compensation shall be taxed and collected as costs in the suit.

SOURCES: Laws, 1981, ch. 495, § 11, eff from and after July 1, 1981.

Cross References — Compensation for arbitrators, see § 25-7-35.

RESEARCH REFERENCES

ALR. Liability of parties to arbitration for costs, fees, and expenses. 57 A.L.R.3d 633.

Attorneys' fees: cost of services provided by paralegals or the like as compensable

element of award in state court. 73 A.L.R.4th 938.

CJS. 6 C.J.S., Arbitration §§ 75, 179-183.

§ 11-15-123. Modification or correction of award by arbitrators.

Upon request by a party to the arbitration, mailed by registered or certified mail to the arbitrators and opposing party(s) within twenty (20) days of the receipt of the award, to modify or correct the award on any or all of the grounds enumerated in Section 11-15-135, the arbitrators shall, within ten (10) days, modify, correct or affirm the award as they find proper.

SOURCES: Laws, 1981, ch. 495, § 12, eff from and after July 1, 1981.

RESEARCH REFERENCES

ALR. Power of arbitrator to correct, or power of court to correct or resubmit, nonlabor award because of incompleteness or failure to pass on all matters submitted. 36 A.L.R.3d 939.

Power of court to resubmit matter to arbitrators for correction or clarification, because of ambiguity or error in, or omis-

sion from, arbitration award. 37 A.L.R.3d 200.

Admissibility of affidavit or testimony of arbitrator to impeach or explain award. 80 A.L.R.3d 155.

Am Jur. 4 Am. Jur. 2d, Alternative Dispute Resolution § 210.

CJS. 6 C.J.S., Arbitration §§ 94, 119.

§ 11-15-125. Confirmation of award by court.

Upon application by a party to the arbitration filed within ninety (90) days of the receipt of the later of a copy of the award issued pursuant to Section 11-15-119, or a modified or corrected award as provided by Section 11-15-123 the court shall confirm an award, unless within the time limits hereinafter imposed grounds are urged for vacating, modifying or correcting the award, in which case the court shall proceed as provided in Sections 11-15-133 and 11-15-135.

SOURCES: Laws, 1981, ch. 495, § 13, eff from and after July 1, 1981.

RESEARCH REFERENCES

Am Jur. 5 Am. Jur. 2d, Alternative Dispute Resolution § 212.

CJS. 6 C.J.S., Arbitration §§ 120-122.

§ 11-15-127. Form and service of application and notice.

Except as otherwise provided, an application to the court under Sections 11-15-101 through 11-15-143 shall be by motion and shall be heard in the manner and upon the notice provided by law or rule of court for the making and hearing of motions. Unless the parties have agreed otherwise, notice of an initial application for an order shall be served in the manner provided by law for the service of a summons in an action.

SOURCES: Laws, 1981, ch. 495, § 14, eff from and after July 1, 1981.

§ 11-15-129. Jurisdiction of circuit courts over arbitration.

The term "court" as used in Sections 11-15-101 through 11-15-143 means the circuit court of the county as provided in Section 11-15-131. The making of an agreement or provision for arbitration subject to Sections 11-15-101 through 11-15-143 and providing for arbitration in this state shall, whether made within or outside this state, confer jurisdiction on the court to enforce the agreement or provision under Sections 11-15-101 through 11-15-143 and to enter judgment on an award duly rendered in an arbitration thereunder and to vacate, modify or correct an award rendered thereunder for such cause and in the manner provided in Sections 11-15-101 through 11-15-143.

SOURCES: Laws, 1981, ch. 495, § 15, eff from and after July 1, 1981.

RESEARCH REFERENCES

ALR. Validity and effect, and remedy in respect, of contractual stipulation to submit disputes to arbitration in another jurisdiction. 12 A.L.R.3d 892.

§ 11-15-131. Venue of arbitration applications.

An initial application shall be made to the court of the county in which the agreement provides the arbitration hearing shall be held or, if the hearing has been held, in the county in which it was held. Otherwise, the application shall be made in the county where the adverse party resides or has a place of business or, if he has no residence or place of business in this state, to the court of any county. All subsequent applications shall be made to the court hearing the initial application unless the court otherwise directs.

SOURCES: Laws, 1981, ch. 495, § 16, eff from and after July 1, 1981.

§ 11-15-133. Vacating arbitration award.

(1) Upon application of a party, the court shall vacate an award where:

- (a) The award was procured by corruption, fraud or other undue means;
- (b) There was evident partiality by an arbitrator appointed as a neutral or corruption in any of the arbitrators or misconduct prejudicing the rights of any party.

The fact that the relief was such that it could not or would not be granted by a court of law or equity is no ground for vacating or refusing to confirm the award.

(2) An application under this section shall be made within ninety (90) days after receipt of a copy of the award to the applicant, except that, if predicated upon corruption, fraud or other undue means, it shall be made within ninety (90) days after such grounds are known or should have been known.

(3) In vacating the award on such grounds, the court may order a rehearing before new arbitrators chosen as provided in the agreement or provision for arbitration or, in the absence thereof, by the court in accordance with Section 11-15-107. The time within which the agreement or provision for arbitration requires the award to be made is applicable to the rehearing and commences from the date of the order.

(4) If the application to vacate is denied and no motion to modify or correct the award is pending, the court shall confirm the award.

SOURCES: Laws, 1981, ch. 495, § 17, eff from and after July 1, 1981.

Cross References — Jurisdiction of circuit courts, generally, see §§ 9-7-81 et seq. Applicability of procedure in this section to one seeking order directing parties to proceed to arbitration, see § 11-15-105.

Criminal penalty for arbitrator taking bribe, see § 97-9-5.

JUDICIAL DECISIONS

1. In general.

It is not legitimate, in exceptions to an arbitration award, to inquire into the original merits in favor of one party or the other, or to show that in evidence the award ought to have been different or that the law of the case was misconceived or misapplied, or that the decision, in view of all the facts and circumstances, was unjust. Thus, the scope of judicial review is much narrower than in cases where a party challenges the evidentiary basis for a trial court's decision. *Herrin v. Milton M. Stewart, Inc.*, 558 So. 2d 863 (Miss. 1990).

Section 11-15-133, which authorizes an inquiry into "evident partiality," precludes consideration of whether the relief granted by the arbitrator is such that it could have been granted by a court of law or equity. Evident partiality of an arbitrator as a defense of an award is analogous to an attack upon a judge on the grounds of partiality. On appeal, evident partiality may not be shown by an inquiry into the merits. Moreover, the mere appearance of bias that might disqualify a judge will not disqualify an arbitrator. To vacate an award on the grounds of evident partial-

ity, a reviewing court must find some personal interest on the part of the arbitrator. Personal bias of an arbitrator cannot be shown by means other than pecuniary interest or some other actual relationship between the parties. Moreover, an arbitrator's general interest in his or her industry is insufficient grounds for vacating an award. The partiality "must be direct, definite and capable of demonstration rather than remote, uncertain, or speculative." *Herrin v. Milton M. Stewart, Inc.*, 558 So. 2d 863 (Miss. 1990).

Evident partiality of an arbitrator as a defense to an award is analogous to attacks upon a judge on grounds of partiality. Evident partiality has objective and subjective components. It contemplates an objective view of an arbitrator's state of mind, that which would sway the judgment and be reasonably likely to render him or her unable to proceed impartially in a particular case. The statutory language also refers to a subjective mental attitude, a preconceived opinion, or a predisposition toward a party to the arbitration. *Craig v. Barber*, 524 So. 2d 974 (Miss. 1988).

RESEARCH REFERENCES

ALR. Arbitrator's viewing or visiting premises or property alone as misconduct justifying vacation of award. 27 A.L.R.2d 1160.

Arbitrator's consultation with outsider or outsiders as misconduct justifying vacation of arbitration award. 47 A.L.R.2d 1362.

Disqualification of arbitrator by court or stay of arbitration proceedings for interest, bias, prejudice, collusion, or fraud of arbitrators. 65 A.L.R.2d 755.

Time for impeaching arbitration award. 85 A.L.R.2d 779.

Setting aside arbitration award on ground of interest or bias of arbitrators. 56 A.L.R.3d 697.

Refusal or arbitrators to receive evidence, or to permit briefs or arguments, on particular issues as grounds for relief from award. 75 A.L.R.3d 132.

Admissibility of affidavit or testimony of arbitrator to impeach or explain award. 80 A.L.R.3d 155.

Setting aside arbitration award on ground of interest or bias of arbitrators—commercial, business, or real estate transactions. 67 A.L.R.5th 179.

Am Jur. 4 Am. Jur. 2d, Alternative Dispute Resolution §§ 234 et seq.

4 Am. Jur. Proof of Facts 2d, Bias of Arbitrator, §§ 8 et seq. (proof of bias of arbitrator).

CJS. 6 C.J.S., Arbitration §§ 149-169.

§ 11-15-135. Application for modification or correction of award; grounds; joinder with application for vacating award.

(1) Upon application made by a party to the arbitration within ninety (90) days after receipt of a copy of the award, the court shall modify or correct the award where:

(a) There is an evident miscalculation of figures or an evident mistake in the description of any person, thing or property referred to in the award;

(b) The arbitrators have awarded upon a matter not submitted to them and the award may be corrected without affecting the merits of the decision upon the issues submitted; or

(c) The award is imperfect in a matter of form, not affecting the merits of the controversy.

(2) If such application is granted, the court shall modify and correct the award so as to effect its intent and shall confirm the award as so modified and corrected; otherwise, the court shall confirm the award as made.

(3) An application to modify or correct an award may be joined in the alternative with an application to vacate the award.

SOURCES: Laws, 1981, ch. 495, § 18, eff from and after July 1, 1981.

Cross References — Applicability of procedure in this section to one seeking order directing parties to proceed to arbitration, see § 11-15-105.

Criminal penalty for arbitrator taking bribe, see § 97-9-5.

JUDICIAL DECISIONS

1. In general.
2. Modification denied.

1. In general.

Modification of an arbitration award may be had only where the purported mistake is the product of an evident numerical miscalculation or an evident mistake in the description of a person, thing, or property referred to in the award, where the award could be corrected without the merits being affected, or where the award is imperfect in a matter of form that does not affect the merits. *D'Angelo v. Hometown Concepts, Inc.*, 791 So. 2d 270 (Miss. Ct. App. 2001).

2. Modification denied.

Modification of an arbitration award was not appropriate as the amount of damages the arbitrator awarded was not the product of an evident miscalculation of figures, but, rather, the amount was simply based upon the lowest repair estimate submitted by the appellants; the amount of damages to which the appellants were entitled was a contested issue of fact, and any judicial correction of the damage award would improperly affect the merits. *D'Angelo v. Hometown Concepts, Inc.*, 791 So. 2d 270 (Miss. Ct. App. 2001).

RESEARCH REFERENCES

ALR. Disqualification of arbitrator by court or stay of arbitration proceedings for interest, bias, prejudice, collusion, or fraud of arbitrators. 65 A.L.R.2d 755.

Time for impeaching arbitration award. 85 A.L.R.2d 779.

Power of arbitrator to correct, or power of court to correct or resubmit, nonlabor

award because of incompleteness or failure to pass on all matters submitted. 36 A.L.R.3d 939.

Setting aside arbitration award on ground of interest or bias of arbitrators. 56 A.L.R.3d 697.

Refusal of arbitrators to receive evidence, or to permit briefs or arguments, on particular issues as grounds for relief from award. 75 A.L.R.3d 132.

Admissibility of affidavit or testimony of arbitrator to impeach or explain award. 80 A.L.R.3d 155.

Am Jur. 4 Am. Jur. 2d, Alternative Dispute Resolution §§ 234 et seq.

4 Am. Jur. Proof of Facts 2d, Bias of Arbitrator, §§ 8 et seq. (proof of bias of arbitrator).

CJS. 6 C.J.S., Arbitration §§ 149-169.

§ 11-15-137. Order and judgment on award; enforcement; costs.

Upon the granting of an order confirming, modifying or correcting an award, a judgment or decree shall be entered and be enforced as any other judgment or decree. Costs may be awarded by the court.

SOURCES: Laws, 1981, ch. 495, § 19, eff from and after July 1, 1981.

RESEARCH REFERENCES

ALR. Death of party before award as revocation or termination of submission to arbitration. 63 A.L.R.2d 754.

Liability of parties to arbitration for costs, fees, and expenses. 57 A.L.R.3d 633.

Am Jur. 4 Am. Jur. 2d, Alternative Dispute Resolution § 233.

2 Am. Jur. Legal Forms 2d, Arbitration and Award §§ 23:31 et seq. (Future disputes).

2 Am. Jur. Legal Forms 2d, Arbitration and Award §§ 23:121-23:143, 23:161-23:165 (Present disputes).

2 Am. Jur. Legal Forms 2d, Arbitration and Award § 23:354 (awards).

CJS. 6 C.J.S., Arbitration §§ 145-148, 179-183.

§ 11-15-139. Preparation of judgment roll; docketing judgment or decree.

(1) On entry of judgment or decree, the clerk shall prepare the judgment roll consisting, to the extent filed, of the following:

(a) The agreement or provision for arbitration and each written extension of the time within which to make the award;

(b) The award;

(c) A copy of the order confirming, modifying or correcting the award; and

(d) A copy of the judgment or decree.

(2) The judgment or decree shall be docketed as if rendered in a civil action.

SOURCES: Laws, 1981, ch. 495, § 20, eff from and after July 1, 1981.

Cross References — Circuit court dockets, generally, see §§ 9-7-171 et seq.

§ 11-15-141. Court actions from which appeal may be taken.

(1) An appeal from the court may be taken from:

(a) An order denying the application to compel arbitration made under Section 11-15-105;

(b) An order granting an application to stay arbitration made under Section 11-15-105;

(c) An order confirming or denying confirmation of an award;

(d) An order modifying or correcting an award;

(e) An order vacating an award without directing a rehearing; or

(f) A judgment or decree entered pursuant to the provisions of Sections 11-15-101 through 11-15-143.

(2) The appeal shall be taken in the manner and to the same extent as from orders or judgments in a civil action.

SOURCES: Laws, 1981, ch. 495, § 21, eff from and after July 1, 1981.

Cross References — Appeals generally, see § 11-51-3 et seq.

RESEARCH REFERENCES

ALR. Appealability of judgment confirming or setting aside arbitration award.
7 A.L.R.3d 608.

§ 11-15-143. Inapplicability of other arbitration provisions.

Sections 11-15-1, 11-15-3, 11-15-5, 11-15-7, 11-15-9, 11-15-11, 11-15-13, 11-15-15, 11-15-17, 11-15-19, 11-15-21, 11-15-23, 11-15-25, 11-15-27, 11-15-29, 11-15-31, 11-15-33, 11-15-35 and 11-15-37, Mississippi Code of 1972, which provide for the submission for determination of disputed matter to arbitrators selected by law or agreement, shall not be applicable to those agreements enumerated in Section 11-15-101.

SOURCES: Laws, 1981, ch. 495, § 22, eff from and after July 1, 1981.

CHAPTER 17

Suits to Confirm Title or Interest and to Remove Clouds on Title

SEC.

- 11-17-1. Proceedings to confirm tax title.
- 11-17-3. Confirmation of state land patents.
- 11-17-5. Confirmation of state land patents; duty of attorney general.
- 11-17-7. Confirmation of state land patents; powers of court.
- 11-17-9. Confirmation of state land patents; decree; effect of fraud and failure to pay purchase price.
- 11-17-11. Confirmation of state land patents; appeals.
- 11-17-13. Confirmation of state land patents; res judicata.
- 11-17-15. Confirmation of state land patents; duty of district attorney and county attorney.
- 11-17-17. Confirmation of state land patents; construction of Sections 11-17-3 through 11-17-17.
- 11-17-19. Confirmation of title or interests granted by political subdivision.
- 11-17-21. Proceedings in suit for confirmation of title granted by political subdivision; defaults.
- 11-17-23. Confirmation of title or interest granted by political subdivision; decree; res judicata.
- 11-17-25. Confirmation of title or interest granted by political subdivision; appeals.
- 11-17-27. Confirmation of title or interest granted by political subdivision; applicability of Sections 11-17-19 through 11-17-27.
- 11-17-29. Any other title may be confirmed.
- 11-17-31. Removing clouds upon titles.
- 11-17-33. Receiver appointed for nonresident or unknown owners of mineral interests.
- 11-17-34. Disposition of mineral lease proceeds held by receiver.
- 11-17-35. Title of complainant must be deraigned—and decrees, in certain cases, recorded as deeds.
- 11-17-37. Decrees as to possession, rents, etc.

§ 11-17-1. Proceedings to confirm tax title.

Any person holding or claiming under a tax title lands heretofore or hereafter sold for taxes, when the period of redemption has expired, may proceed by sworn complaint in the chancery court to have such title confirmed and quieted, and shall set forth in his complaint his claim under the tax sale, and the names and places of residence of all persons interested in the land, so far as known to plaintiff, or as he can ascertain by diligent inquiry. Where the names of persons in interest or their places of residence are unknown and have not been ascertained by diligent inquiry, the complaint shall so state. Where the name and places of residence of persons in interest are given they shall be made parties defendant. Where the complaint shall show that the persons interested are unknown to plaintiff and that he has made diligent inquiry for their names and could not obtain them, all persons interested may be made defendants by a notice addressed: "To all persons having or claiming any interest in the following described land, sold for taxes on (inserting date of sale), viz: (Describing land as described in the tax collector's conveyance)." The

notice shall state the nature of the suit and it shall be published in accordance with the requirements of the Mississippi Rules of Civil Procedure. It shall be lawful in all cases to set forth in the complaint the names of all persons interested, as far as ascertained, and make them parties and also to join and make defendants "all persons having or claiming any legal or equitable interest in" the lands described in the complaint. Such suits shall be proceeded with as other cases; and if the complaints be taken for confessed, or if it appear that plaintiff is entitled to a judgment, it shall be rendered, confirming the tax title against all persons claiming to hold the land by title existing at the time of the sale for taxes. Such judgment shall vest in the plaintiff, without any conveyance by a master or commissioner, a good and sufficient title to said land; and such judgment shall, in all courts of this state, be held as conclusive evidence that the title to said land was vested in the plaintiff, as against all persons claiming the same under the title existing prior to the sale for taxes.

SOURCES: Codes, 1871, § 1753; 1880, § 578; 1892, § 498; Laws, 1906, § 548; Hemingway's 1917, § 305; Laws, 1924, ch. 151; Laws, 1930, § 402; Laws, 1942, § 1314; Laws, 1991, ch. 573, § 32, eff from and after July 1, 1991.

Cross References — The constitutional jurisdiction of the Chancery Court to decree title and possession of real property, see Miss. Const. Art. 6, § 160.

Action of unlawful detainer by purchaser of land at tax sale, see § 11-25-3.

Limitation of actions concerning title to land, see §§ 15-1-7, 15-1-9, 15-1-15, 15-1-17.

Records of tax titles, see §§ 27-41-81, 27-41-83.

Map of public trust tidelands; boundary challenges, see § 29-15-7.

Procedural rules applicable to civil actions, see Miss. R. Civ. P. 1 et seq.

JUDICIAL DECISIONS

1. Validity.
2. Construction and application generally.
3. Right to maintain suit to confirm title.
4. —Title in complainant.
5. —Void or defective title.
6. Defenses.
7. Proceedings in general.
8. —Pleading.
9. —Evidence.
10. —Parties.
11. —Decree.

1. Validity.

The statute is constitutional. *Belcher v. Mhoon*, 47 Miss. 613 (1873).

2. Construction and application generally.

Where in a suit to confirm a tax sale, this section [Code 1942, § 1314] and Code 1942, § 1323, as to special process, had not been complied with, and although it was charged that one of the defendants

was residing in the state of Georgia, the bill failed to charge that she was a non-resident of Mississippi, and neither the owner of title at the time of the tax sale, if living, nor his heirs, if he was dead, were made parties, the confirmation decree rendered therein was void. *White v. Merchants & Planters Bank*, 229 Miss. 35, 90 So. 2d 11 (1956).

The purpose of this statute [Code 1942, § 1314] providing for confirmation of a tax title is that by such a proceeding any further litigation between the same parties, or their successors in title, as to the validity of the tax title, shall be precluded. *Hatten v. Jones*, 218 Miss. 326, 67 So. 2d 363 (1953).

Where a chancellor committed an error of law in holding that the bill of complaint and exhibits for a decree of confirmation of tax titles were sufficient to warrant a decree of confirmation, but since he had jurisdiction of the subject matter and of the party he had jurisdiction to commit

error, and since his decree was not void on its face the same is not subject to a collateral attack seeking to cancel tax claims as clouds upon titles. *Hatten v. Jones*, 218 Miss. 326, 67 So. 2d 363 (1953).

Where an action was brought to determine the rights of owners to the minerals, and the land involved was subject to railroad right of way and owners of adjoining lands by right of adverse possession were in possession of subsurface minerals under the right of way, the action is one to remove clouds on title rather than suit to quiet and confirm title. *Jones v. New Orleans & N.R. Co.*, 214 Miss. 804, 59 So. 2d 541 (1952).

Purpose of suit to confirm tax title is not only to settle contentions between main parties but is to make tax title good against world, so that there may be no further litigation concerning validity of tax title. *Lamar Life Ins. Co. v. Billups*, 175 Miss. 771, 169 So. 32 (1936).

Statute authorizing proceeding to confirm tax title, and requiring names of all persons interested in land, so far as known, to be set forth in bill, must be strictly complied with. *Lamar Life Ins. Co. v. Billups*, 175 Miss. 771, 169 So. 32 (1936).

This section [Code 1942, § 1314] has no application to a suit to recover money paid at a void tax sale. *Moores v. Flurry*, 87 Miss. 707, 40 So. 226 (1906).

The section [Code 1942, § 1314] applies to every variety and species of tax title. *Chrisman v. Currie*, 60 Miss. 858 (1883); *Metcalfe v. Perry*, 66 Miss. 68, 5 So. 232 (1888).

The statute authorizing a rehearing by defendants brought in by publication only, applies to a decree confirming tax titles. *Belcher v. Wilkerson*, 54 Miss. 677 (1877).

The statute embraces levee tax titles, however acquired. *Belcher v. Mhoon*, 47 Miss. 613 (1873); *Beirne v. Burdett*, 52 Miss. 795 (1876).

3. Right to maintain suit to confirm title.

4. —Title in complainant.

One seeking to confirm a tax title must recover, if at all, on the validity of his own title. *Gregory v. Brogan*, 76 Miss. 694, 21

So. 521 (1897); *Davis v. Cass*, 72 Miss. 985, 18 So. 454 (1895).

Under this section [Code 1942, § 1314] a complainant must show either a legal or an equitable title to the land described in the bill of complaint before the court will entertain the bill or grant the relief therein prayed for. *Reliance Inv. Co. v. Johnson*, 188 Miss. 227, 193 So. 630 (1940), error overruled, 188 Miss. 236, 194 So. 749 (1940).

Plaintiff must prove title to land in himself. *Paepcke-Leicht Lumber Co. v. Savage*, 137 Miss. 11, 101 So. 709 (1924).

In suit to confirm title plaintiff must plead and prove perfect title. *Gilchrist-Fordney Co. v. Keyes*, 113 Miss. 742, 74 So. 619 (1917).

Complainant must show title in himself. *Peterson v. Kittredge*, 65 Miss. 33, 3 So. 65 (1887).

5. —Void or defective title.

Where the owner of land applied in good faith to the tax collector for the purpose of ascertaining the amount of taxes and paying the same, and was prevented from making payment by the error or mistake of the collector, the attempt to pay was the equivalent of payment, and the subsequent sale of the land in question for nonpayment of taxes was void, and the purchaser at the sale acquired no title which would support a decree of confirmation. *Williams v. Scott*, 251 Miss. 533, 170 So. 2d 621 (1965).

Purchasers were entitled to a return of their deposit made in connection with their contract to purchase land in view of the delay of the sellers in procuring a supposed marketable title and because, in view of this section [Code 1942, § 1314] and Code 1942, § 1391, certain rights of appeal remained in regard to the necessary confirmation of tax title to the property which could still affect the validity thereto. *Hyde v. Berggren*, 249 Miss. 860, 164 So. 2d 454 (1964).

Where defendants were in adverse possession of land but before they acquired title, the tax title of both city and state ripened, and where a suit to confirm title was commenced within ten years after the city parted with its title, defendants could not and did not acquire title by adverse

possession. *Melvin v. Parker*, 223 Miss. 430, 78 So. 2d 477 (1955).

Deed of purchaser at tax sale for unpaid taxes was not sustained, in suit to quiet title, where owner introduced into evidence duplicate receipt, issued pursuant to Hemingway's Code, 1927, § 8241, showing owner paid taxes and where owner orally testified that he paid the taxes and such testimony was uncontradicted. *Walker v. Polk*, 208 Miss. 389, 44 So. 2d 477 (1950).

Any ambiguity in description of the land in the assessment or tax deed does not render the tax proceeding void, but is curable by parol. *Martin v. Smith*, 140 Miss. 168, 105 So. 494 (1925).

A tax title, where the sale is based upon a roll not returned at the time required by law and the description is void for uncertainty, will not be confirmed. *Pearce v. Perkins*, 70 Miss. 276, 12 So. 205 (1892).

6. Defenses.

Delay did not estop true owner from asserting title against purchaser at invalid tax sale where tax purchaser made no improvements or any expenditures or otherwise changed his position, except for payment of taxes subsequent to sale, which amount was offset by sums received as cash consideration for oil and gas lease and by rents paid by tenants. *Walker v. Polk*, 208 Miss. 389, 44 So. 2d 477 (1950).

Defendant, whose interest in the land in question was totally extinguished by the tax sale to the state and the elapse of the period of redemption, could not set up as against the complainant the defense of fraud in the procurement of a patent to such land from the state by complainant's predecessor, since such matter could only be raised by the Land Commissioner, and accordingly, complainant was entitled to a decree confirming the title in him as against the defendant, where defendant's evidence did not disclose facts which rendered any of the deeds in the complainant's chain of title nullity. *Reliance Inv. Co. v. Johnson*, 188 Miss. 227, 193 So. 630 (1940), error overruled, 188 Miss. 236, 194 So. 749 (1940).

Defendant must have an interest in the land or his defense will not be heard. *Chrisman v. Currie*, 60 Miss. 858 (1883).

7. Proceedings in general.

This statute applies only where the court rendering the decree of confirmation has jurisdiction of the subject matter and the parties and renders such a decree valid on its face, and as between the parties who are before the court by a valid service of process. *Hatten v. Jones*, 218 Miss. 326, 67 So. 2d 363 (1953).

8. —Pleading.

In suit to cancel tax title, as cloud on title, affirmative relief declaring tax title to be valid could not be granted in absence of cross bill. *Webb v. Anderson*, 206 Miss. 398, 40 So. 2d 189 (1949).

In deraignments of title, where confirmation of title is sought, the complainant must give the facts of his title and a mere allegation of ownership is insufficient, being simply a legal conclusion. *Helbig v. Hooper*, 200 Miss. 282, 25 So. 2d 404 (1946).

It is not necessary to exhibit with a bill to confirm a tax title a certified copy of the list of sales made to the state. *Campbell v. Wilson*, 194 Miss. 746, 13 So. 2d 624 (1943).

Where a certified copy of the list of tax sales to the state is not exhibited with a bill to confirm a tax title to land, it is necessary to allege in terms of fact and not by way of mere legal conclusion that every successive step essential to the validity of the tax sale-alleging the facts as to each essential step—was had and taken by the taxing authorities, inclusive from the original assessment by the tax assessor down to the sale itself. *Campbell v. Wilson*, 194 Miss. 746, 13 So. 2d 624 (1943).

Failure to allege in bill to confirm a tax title that there was legal process upon or notice to the taxpayer prior to the equalization of the assessment roll was fatal to the validity of a decree, where no certified copy of the list of tax sales to the state was made an exhibit through the bill. *Campbell v. Wilson*, 194 Miss. 746, 13 So. 2d 624 (1943).

Complaint, in suit to confirm title to land under patent issued plaintiff in 1936, which alleged that prior patent was issued to another in 1926 but failed to allege that original buyer was given notice of sale or that he did not obtain lands in good faith or that price was unfair and unreason-

able, was demurrable. *Easterling v. Howie*, 179 Miss. 680, 176 So. 585 (1937).

In proceeding to confirm tax title, clerk's tax sale books should be made exhibits to bill, or bill should allege that required notice was given to parties whose interests are affected, so that court may see that there are no outside liens. *Lamar Life Ins. Co. v. Billups*, 175 Miss. 771, 169 So. 32 (1936).

Where a bill to confirm a tax title alleges a valid sale for taxes and exhibits a tax deed in statutory form it cannot be assumed on demurrer that the assessment was under the unconstitutional act of 1888 (laws, p. 24) because the tax deed recites that the sale was for taxes assessed for 1890. *Coffee v. Coleman*, 85 Miss. 14, 37 So. 499 (1904).

A demurrer to a bill in equity to confirm a tax deed does not admit the validity of the deed, although the bill avers that the recital in the deed of the year for whose taxes the land was sold was a clerical error, that the tax collector intended to have it recite that the sale was made for the year preceding the one actually recited, and that the sale in fact was made for the taxes of the preceding year. *Bower v. Chess & Wyman Co.*, 83 Miss. 218, 35 So. 444 (1903).

9. —Evidence.

In a suit to confirm tax title to land in city assessed and sold to city and state for delinquent taxes, testimony of a person who had platted the subdivision that fence was the dividing line between a platted subdivision and land retained by the former owner as his home was inadmissible. *Melvin v. Parker*, 223 Miss. 430, 78 So. 2d 477 (1955).

Purchaser at tax sale who seeks to have tax title quieted and confirmed has burden of proving valid assessment of land for taxes and that taxes for which land was offered for sale had not been paid. *Walker v. Polk*, 208 Miss. 389, 44 So. 2d 477 (1950).

Tax deed is prima facie evidence of legal assessment and sale. *Jones County Land Co. v. Fox*, 120 Miss. 798, 83 So. 241 (1919); *Walker v. Polk*, 208 Miss. 389, 44 So. 2d 477 (1950); *Melvin v. Parker*, 223 Miss. 430, 78 So. 2d 477 (1955).

10. —Parties.

A record owner of land by direct chain of title from the government is a necessary party to proceeding to confirm tax title to land against the state and all persons interested therein and, aware that no process was served on him, he is not precluded from asserting the invalidity of the tax sale. *Leech v. Masonry Corp.*, 219 Miss. 176, 68 So. 2d 297 (1953).

In suit to confirm tax title to certain lands and to cancel defendants' claims to interest therein, complainant was not entitled to a decree of confirmation where there was no compliance with the requirements of special process to all persons having or claiming any legal or equitable interests in the lands, although prayer for cancelation of defendants' claims as clouds upon complainant's title was correctly decreed. *Stern v. Parker*, 200 Miss. 27, 25 So. 2d 787 (1946), error overruled, 200 Miss. 41, 27 So. 2d 402 (1946).

In proceedings to confirm tax titles, the owner of the land at the time of a sale for delinquent taxes is a necessary party. *Helbig v. Hooper*, 200 Miss. 282, 25 So. 2d 404 (1946).

Bill for confirmation of title to land as against persons unknown must comply with the requirements of this section [Code 1942, § 1314] in respect to making such person defendant by notice. *Dorsey v. Sullivan*, 199 Miss. 602, 24 So. 2d 852 (1946).

In suit by purchaser at tax sale to confirm tax title, failure to make owners of land at time of sale, who were known to purchaser, parties to suit, held reversible error, notwithstanding that their interest had been divested by trust deed foreclosure sale subsequent to tax sale. *Lamar Life Ins. Co. v. Billups*, 175 Miss. 771, 169 So. 32 (1936).

Proceeding to confirm tax titles held void because publication of summons was for unknown parties only, though apparent owners appeared on face of pleadings. *Paepcke-Leicht Lumber Co. v. Savage*, 137 Miss. 11, 101 So. 709 (1924).

Owners of land sold for taxes necessary parties defendant to proceedings to confirm tax titles and those acquired by adverse possession. *Paepcke-Leicht Lumber Co. v. Savage*, 137 Miss. 11, 101 So. 709 (1924).

Bill to confirm tax title is demurrable where one named in the tax deed exhibited as the person assessed with the taxes for which the land was sold is not made a defendant. *Smith v. W. Denny & Co.*, 90 Miss. 434, 43 So. 479 (1907).

11. —Decree.

Decree confirming complainant's title to all minerals on or under certain land cannot stand where decree was taken against defendant prior to the due date of its answer, plea or demurrer. *Kalmia Realty & Ins. Co. v. Hendrix*, 25 So. 2d 407 (Miss. 1946).

Confirmation decree is void and no defense to ejectment suit by those claiming under owner where a state conveyed to complainant, a stranger to the title, before redemption period expired. *Magee v. Turner*, 92 Miss. 438, 46 So. 544 (1908).

Upon decree quieting complainant's title to land and cancelling defendant's tax

title: (a) it was proper to allow defendant the sum paid by him as purchaser at tax sale with 25% damages and 10% per annum interest thereon, the land being taxable at time of sale; but (b) where land not taxable at the time it was proper to disallow defendant money paid state to redeem, and allow him only taxes paid after land became taxable with 6% per annum thereon; and (c) it was improper not to divide costs of an accounting equally between the parties, there being charges against both; and (d) it was improper to disallow complainant's well proven claim for rent on part of the land. *McMahon v. Yazoo Delta Lumber Co.*, 92 Miss. 459, 43 So. 957 (1907).

Confirmation of a tax title carries with it the right of way of a railroad company, but not its tracks and superstructure. *Illinois Cent. R.R. v. Le Blanc*, 74 Miss. 650, 21 So. 760 (1897).

RESEARCH REFERENCES

ALR. Real property quiet-title actions against United States under Quiet Title Act (28 USCS § 2409a). 60 A.L.R. Fed. 645.

Am Jur. 27A Am. Jur. 2d, Equity §§ 30, 34-37.

65 Am. Jur. 2d, Quieting Title and Determination of Adverse Claims §§ 1 et seq.

20 Am. Jur. Pl & Pr Forms (Rev), Qui-

eting Title and Determination of Adverse Claims, Form 31 (Complaint, petition, or declaration by purchaser of tax-deeded property to quiet title).

20 Am. Jur. Pl & Pr Forms (Rev), Quieting Title and Determination of Adverse Claims, Form 32 (Complaint, petition, or declaration by owner of property to remove tax deed as cloud on title).

CJS. 30 C.J.S., Equity § 86.

§ 11-17-3. Confirmation of state land patents.

Any patentee, or any person, firm or corporation, claiming title or other interest in land under or through any patentee by virtue of any patent issued by the state for lands forfeited to the state for nonpayment of taxes, whether such claimant be in possession or not, or be threatened to be disturbed in his possession or not, may proceed as party plaintiff against the state, as a party defendant, by sworn complaint in the chancery court of the county where the land, or some part thereof, is situated, to have such title or interest confirmed and quieted. No deraignment of plaintiff's title in such cases shall be required.

SOURCES: Codes, 1942, § 1315; Laws, 1940, ch. 309; Laws, 1991, ch. 573, § 33, eff from and after July 1, 1991.

Cross References — Effect of actual occupation under tax title, see § 15-1-15.

Confirmation of bridge and park commission's title to submerged lands, see §§ 55-7-13 et seq.

Procedural rules applicable to civil actions, see Mississippi Rules of Civil Procedure, Rules 1 et seq.

JUDICIAL DECISIONS

1. In general.
2. Parties.
3. Validity of assessment.
4. Effect of invalid tax sale.

1. In general.

Where an action was brought in 1945 against the state to confirm a forfeited tax land patent and there was an adjudication of validity of the patent, and that though fraud had been perpetrated, the land commissioner and attorney general properly refused to cancel the tax sale to state and patent issued thereunder in an action brought therefor in 1949 by the heirs of the original owner of forfeited lands. *Carney v. Anderson*, 214 Miss. 504, 58 So. 2d 13, 38 A.L.R.2d 981 (1952), motion overruled, 217 Miss. 504, 59 So. 2d 262 (1952), cert. denied, 344 U.S. 860, 73 S. Ct. 101, 97 L. Ed. 667 (1952), reh'g denied, 344 U.S. 888, 73 S. Ct. 186, 97 L. Ed. 687 (1952), reh'g denied, 344 U.S. 905, 73 S. Ct. 286, 97 L. Ed. 699 (1952).

Where in 1931 a deed of trust on certain land was issued to a bank as security for a loan, and later that land was sold at a tax sale and not redeemed, in 1939 the bank's remedy at law to recover the debt was barred by statute of limitations and direct remedy in equity was likewise barred. *State v. Magnolia Bank*, 212 Miss. 47, 53 So. 2d 79 (1951).

Defendant in a quiet title action could not challenge the validity of a patent from the state to tax forfeited land on the ground that the consideration therefor was grossly inadequate where, in a prior action by plaintiff to confirm his title, the chancery court had adjudicated that the patent from the state to the plaintiff was valid and confirmed the plaintiff's title against the state. *Comfort v. Landrum*, 52 So. 2d 658 (Miss. 1951).

The purpose of this act was to stabilize and validate public land titles and promote the private use and enjoyment of such land, to quiet title to same, and to enable owners thereof to procure full right of ownership and title in fee simple

thereto. *State v. Cummings*, 203 Miss. 583, 35 So. 2d 636 (1948).

Where bank and its lessee sought confirmation of tax title in two separate suits based upon two different tax sales of the same land to the state, which suits had been consolidated, chancellor did not err in rescinding order of consolidation. *Merchants & Mfrs. Bank v. State*, 200 Miss. 291, 25 So. 2d 585 (1946).

The benefit of this statute relating to validity and quieting title based on tax forfeited land patents is available to purchasers who acquired land through patents issued subsequently to its enactment, as well as to those who acquired land through patents issued prior to its passage. *State v. Lewis*, 192 Miss. 890, 7 So. 2d 871 (1942).

Nor does this statute violate § 95 of the Constitution of 1890, nor the constitutional provision (§ 100, Const. 1890) prohibiting the remission, relief or postponement by the legislature of any obligation or liability held or owned by the state. *State v. Roell*, 192 Miss. 873, 7 So. 2d 867 (1942).

This is a procedural statute, under which the claimant of tax forfeited lands, in the event of his not being guilty of fraud or violation of any positive statute can obtain a judicial determination of this fact; and the presumption is in favor of the existence and due performance of all the conditions upon which the validity of the patent depends. *State v. Roell*, 192 Miss. 873, 7 So. 2d 867 (1942).

This statute does not violate §§ 87 and 90(u) of the Constitution of 1890, forbidding the enactment of special or local laws in certain enumerated cases. *State v. Roell*, 192 Miss. 873, 7 So. 2d 867 (1942); *State v. Lewis*, 192 Miss. 890, 7 So. 2d 871 (1942).

2. Parties.

A record owner of land by direct chain of title from the government is a necessary party to proceeding to confirm tax title to land against the state and all persons

interested therein and aware that no process was served on him, he is not precluded from asserting the invalidity of the tax sale. *Leech v. Masonite Corp.*, 219 Miss. 176, 68 So. 2d 297 (1953).

In suit to confirm tax title to certain lands and to cancel defendants' claims therein, complainant was not entitled to a decree of confirmation where there was no compliance with the requirement of this section [Code 1942, § 1315] that the state be made a party with process served on the attorney general, although complainant was entitled to a decree canceling defendants' claim as clouds upon complainant's title. *Stern v. Parker*, 200 Miss. 27, 25 So. 2d 787 (1946), error overruled, 200 Miss. 41, 27 So. 2d 402 (1946).

General statutes as to service on or making the land commissioner a party on behalf of the state, do not apply to proceedings brought under this section [Code 1942, § 1315]. *Pace v. Wedgeworth*, 198 Miss. 1, 20 So. 2d 842 (1945).

Intervenor, in filing cross-bill claiming title to the land in proceeding by patentee under this section [Code 1942, § 1315] to quiet title thereto, was not required to have process served on the state land commissioner. *Pace v. Wedgeworth*, 198 Miss. 1, 20 So. 2d 842 (1945).

3. Validity of assessment.

In suit to confirm tax title wherein state and original complainants claiming through purchasers thereof from state, specifically alleged that land in question had been duly and legally assessed, and former owner denied legality of assessment, both original complainants and state under its cross-bill were required in order to obtain such relief to prove that the land had been duly and legally assessed. *Merchants & Mfrs. Bank v. State*, 200 Miss. 291, 25 So. 2d 585 (1946).

Specific allegations by original complainants and state in suit to confirm tax title that land in question, situated in the first judicial district of Jones county, was duly and legally assessed would include approval of assessment rolls in first judicial district of such county at the August meeting of the Board of Supervisors sitting at Ellisville in such district. *Merchants & Mfrs. Bank v. State*, 200 Miss. 291, 25 So. 2d 585 (1946).

Where proof, which went in without objection in trial court, disclosed affirmatively that the minutes of the meeting of the board of supervisors of Jones County at Ellisville, at which order approving assessment rolls of the first judicial district of such county was entered, were not signed by the president of the board as required by law, effect of failure to sign the minutes on the validity of the assessment and subsequent tax sale of land assessed was sufficiently raised by former owner's denial of legality of the assessment as alleged in the original bill and cross-bill of the state in suit to confirm tax title. *Merchants & Mfrs. Bank v. State*, 200 Miss. 291, 25 So. 2d 585 (1946).

Where the only sitting of the board of supervisors of Jones County at Ellisville in the First Judicial District during August was on a specific date at which an order was entered for approval of the assessment roll for lands in the First Judicial District, and the minutes for such meeting were not signed by the president of the board, the assessment and subsequent tax sale based thereon were void, and state acquired no title by virtue of such sale as to warrant confirmation thereof either by the state or persons claiming through purchasers from the state. *Merchants & Mfrs. Bank v. State*, 200 Miss. 291, 25 So. 2d 585 (1946).

Assessment description of certain lands as "N W $\frac{1}{4}$ S W $\frac{1}{4}$, less 6A, Section 2, Township 2, Range 18," although containing patent ambiguity by reason of the statement "less 6A," did not render the tax sale to the state void because of indefinite description where the tax conveyance to the state contained a clue, which traced through the assessment rolls and the deeds of conveyances, ultimately led to a definite description of excepted 6 acres, the assessment rolls and deeds of conveyances being admissible in evidence to clarify the ambiguity. *Jefferson v. Walker*, 199 Miss. 705, 24 So. 2d 343 (1946), error overruled, 199 Miss. 725, 26 So. 2d 239 (1946).

4. Effect of invalid tax sale.

Decree in a confirmation suit adjudicating the validity of a patent from the state to tax forfeited land, which did not purport to affect claims of defendant in a

subsequent quiet title action either by adverse possession or under a quitclaim deed from the owner at the time of the tax sale, does not preclude such defendant from asserting adverse possession or invalidity of the tax sale. *Comfort v. Landrum*, 52 So. 2d 658 (Miss. 1951).

One bringing an action under this section [Code 1942, § 1315] was not entitled to a decree confirming his title as vendee of a patentee where the tax sale to the state after the regular time for sale had passed was void because the board of supervisors had fixed the time for such sale before the regular date therefor had

expired. *Hooper v. Walker*, 201 Miss. 158, 29 So. 2d 72 (1947).

Where neither the state, the patentees, nor subsequent vendees of land sold to the state for taxes acquired any title thereto because of invalidity of tax sales, oil company taking lease from subsequent vendee acquired no greater right than the state had, even though it may have been innocent of the want of authority of its lessor to purchase the land, and, therefore, a decree confirming the lease was erroneous. *Merchants & Mfrs. Bank v. State*, 200 Miss. 291, 25 So. 2d 585 (1946).

RESEARCH REFERENCES

Am Jur. 27A Am. Jur. 2d, Equity § 55.
65 Am. Jur. 2d, Quieting Title and Determination of Adverse Claims §§ 1 et seq.

CJS. 30 C.J.S., Equity § 86.

§ 11-17-5. Confirmation of state land patents; duty of attorney general.

The attorney general, in proper cases after investigation, shall file an answer in all such cases setting up any defense on the part of the state of Mississippi, and all of the pleadings in such cases shall be the same as in other cases in chancery. The said cause shall be heard and determined as other cases in chancery.

SOURCES: Codes, 1942, § 1316; Laws, 1940, ch. 309.

Cross References — Constitutional provision conferring power upon chancery court to decree title to real estate, see Miss. Const. Art. 6, § 160.

Another section derived from same 1942 code section, see § 11-17-7.

Confirmation of bridge and park commission's title to submerged lands, see §§ 55-7-15, 55-7-17.

Procedural rules applicable to civil actions, see Miss. R. Civ. P. 1 et seq.

JUDICIAL DECISIONS

1. In general.

In an action by a bank against the state to quiet title where the rights and remedies of the bank under a deed of trust were barred by the statute of limitations at the time the bank acquired a tax forfeited land patent and where the patent was void, the absence of a specific plea of statute of limitations was not defective and the bank was not entitled to quiet

title. *State v. Magnolia Bank*, 212 Miss. 47, 53 So. 2d 79 (1951).

Dismissal of suit to confirm forfeited tax patent, upon adjudication of invalidity, without cancelation of invalid patents, was proper, in absence of cross-bill by state asking such affirmative relief. *State v. Harper*, 195 Miss. 580, 15 So. 2d 680 (1943), motion denied, 195 Miss. 597, 16 So. 2d 29 (1943).

RESEARCH REFERENCES

Am Jur. 27A Am. Jur. 2d, Equity § 55. **CJS.** 30 C.J.S., Equity § 86.
 65 Am. Jur. 2d, Quieting Title and De-
 termination of Adverse Claims §§ 1 et
 seq.

§ 11-17-7. Confirmation of state land patents; powers of court.

The court is hereby granted large discretion and far reaching powers in the matter of establishing and fixing the validity of land patents issued by the state and title conveyed thereunder, and the sound discretion of the court in deciding all such cases shall be the controlling factor in settling the issues where only state interests are involved. No decree pro confesso shall be taken against the state, but on failure of the attorney general to answer within the time required by law, the cause shall be heard on the bill and proof thereon.

SOURCES: Codes, 1942, § 1316; Laws, 1940, ch. 309.

Cross References — Constitutional provision conferring power upon chancery court to decree title to real estate, see Miss. Const. Art. 6, § 160.

Another section derived from same 1942 code section, see § 11-17-5.

Procedural rules applicable to civil actions, see Miss. R. Civ. P. 1 et seq.

JUDICIAL DECISIONS

1. In general.

The rule that even where the debt secured by a mortgage is barred by the statute of limitations, the mortgagee cannot be deprived of possession by the mortgagor until the debt is paid does not apply in an action by a bank against the state to quiet title where the rights of the bank under a deed of trust were barred by the statute of limitations at the time the bank acquired a tax forfeited land patent and

the patent was void. *State v. Magnolia Bank*, 212 Miss. 47, 53 So. 2d 79 (1951).

Where in 1931 a deed of trust on certain land was issued to a bank as security for a loan, and later that land was sold at a tax sale and not redeemed, in 1939 the bank's remedy at law to recover the debt was barred by statute of limitations and direct remedy in equity was likewise barred. *State v. Magnolia Bank*, 212 Miss. 47, 53 So. 2d 79 (1951).

RESEARCH REFERENCES

Am Jur. 27A Am. Jur. 2d, Equity § 55. **CJS.** 30 C.J.S., Equity § 86.
 65 Am. Jur. 2d, Quieting Title and De-
 termination of Adverse Claims §§ 1 et
 seq.

§ 11-17-9. Confirmation of state land patents; decree; effect of fraud and failure to pay purchase price.

Upon the hearing of such cases, it shall be the duty of the chancery court to enter a decree validating and perfecting the title of said land from the state of Mississippi, unless it shall appear to the court and the court shall find as a fact that the state has not acquired title to said land by virtue of said tax sale,

or that the title to the said land involved in the suit was divested out of the state of Mississippi without payment of purchase price or by reason of actual fraud on the part of the patentee, or his representatives. In such cases of fraud and failure to pay purchase price, the chancery court shall enter a decree forever annulling and cancelling the said patent; but no patent heretofore issued shall be cancelled in such proceeding because of loss of the application papers to purchase said land, or because of errors or omissions or incorrect statements in said application, or other papers in connection with the sale of said land, such matters not constituting fraud as above defined.

SOURCES: Codes, 1942, § 1317; Laws, 1940, ch. 309.

Cross References — Suits to cancel patents to lands fraudulently obtained or issued, see § 29-1-9.

Procedural rules applicable to civil actions, see Miss. R. Civ. P. 1 et seq.

JUDICIAL DECISIONS

1. In general.
2. Fraud of patentee.
3. Payment of purchase price.
4. Errors or omissions.

1. In general.

It was not the intention of the legislature that this section [Code 1942, § 1317] would in any way effect § 4109, Code of 1942, which makes provisions as to who may not purchase public lands. *State v. Magnolia Bank*, 212 Miss. 47, 53 So. 2d 79 (1951).

Where five years after issuance of a state land patent sought to be cancelled by the state the land was again sold for taxes, after which the purchaser at the latter tax sale sold the property to third parties, and some ten years had elapsed since issuance of the patent during which the land was taxed as private property, the equities of the innocent purchasers were protected by the patent as highest evidence of title. *State ex rel. McCullen v. Sproles*, 200 Miss. 678, 28 So. 2d 218 (1946).

Dismissal of suit to confirm forfeited tax patent, upon adjudication of invalidity, without cancelation of invalid patents, was proper, in absence of cross bill by state asking such affirmative relief. *State v. Harper*, 195 Miss. 580, 15 So. 2d 680 (1943), motion denied, 195 Miss. 597, 16 So. 2d 29 (1943).

This section [Code 1942, § 1317] was construed to be in keeping with the declared intention in Code 1942, § 1321,

that the same should be liberally construed to validate and quiet title to such lands as had been theretofore patented, leaving the courts free and unhampered by any suggestions from the legislature in deciding such issues as might arise in suits to confirm and quiet title under patents thereafter issued. *State v. Lewis*, 192 Miss. 890, 7 So. 2d 871 (1942).

This section [Code 1942, § 1317] does not violate the constitutional provision (§ 87) prohibiting special or local laws in cases which are or can be provided for by general law or the constitutional provision (§ 90 u) forbidding the passage of local, private, or special laws with respect to granting any land under the control of the state to any person or corporation. *State v. Roell*, 192 Miss. 873, 7 So. 2d 867 (1942).

2. Fraud of patentee.

This section [Code 1942, § 1317] requires establishment of actual fraud on the part of the patentee, or his representative, in procuring the patent before it can be cancelled on the ground of fraud. *State v. Cummings*, 203 Miss. 583, 35 So. 2d 636 (1948).

Actual fraud is intentional fraud, an intent to deceive being an essential element thereof; it means fraud according to the common conscience, and that the party charged therewith was inspired by a deliberate, fraudulent purpose to injure and deceive the party complaining; it implies deceit, artifice and design, and im-

ports the active operation of the mind; it consists in deception, intentionally practiced to induce another to part with property or to surrender some legal right, and which accomplishes the end designed; and it includes cases of the intentional and successful employment of any cunning, deception, or artifice used to circumvent, cheat or deceive another, falsehood being an ingredient thereof. *State v. Cummings*, 203 Miss. 583, 35 So. 2d 636 (1948).

Actual fraud requiring cancellation of patent from state was not shown by evidence as to defendant's answers to questions in his application for purchase of tax forfeited land with respect to acres of timber thereon and as to the amount of state land purchased by applicant during a particular year. *State v. Cummings*, 203 Miss. 583, 35 So. 2d 636 (1948).

In determining whether patentee committed fraud in deliberately misrepresenting the value of the land, such value is determinable as of the date of the patent and not as of the date of the trial. *Jefferson v. Walker*, 199 Miss. 705, 24 So. 2d 343 (1946), error overruled, 199 Miss. 725, 26 So. 2d 239 (1946).

Lessee of patentee having notice when it purchased its lease of actual fraud committed by the patentee in deliberately misrepresenting the value of the land is bound by such fraud. *Jefferson v. Walker*, 199 Miss. 705, 24 So. 2d 343 (1946), error overruled, 199 Miss. 725, 26 So. 2d 239 (1946).

Construction of the phrase "actual fraud on the part of the patentee, or his representative," contained in this section [Code 1942, § 1317] was not unconstitutional as suspending the operation of any general law for the benefit of any individual, private corporation or association. *State v. Roell*, 192 Miss. 873, 7 So. 2d 867 (1942).

Words "actual fraud on the part of the patentee or his representative," are construable to mean such fraud in the procurement of the patent as the making of false statements to, or intentionally withholding important information from, the state land commissioner as to material facts in regard to which the applicant is required to make a disclosure under oath, and which false representations were ei-

ther known to be false or were made in reckless disregard of whether the same were true or false. *State v. Roell*, 192 Miss. 873, 7 So. 2d 867 (1942).

3. Payment of purchase price.

Defendant in a quiet title action could not challenge the validity of a patent from the state to tax forfeited land on the ground that the consideration therefor was grossly inadequate where, in a prior action by plaintiff to confirm his title, the chancery court had adjudicated that the patent from the state to the plaintiff was valid and confirmed the plaintiff's title against the state. *Comfort v. Landrum*, 52 So. 2d 658 (Miss. 1951).

In an action to quiet title to tax forfeited land which plaintiff had obtained by patent from the state, the validity of which had been confirmed by an action against the state, defendant, claiming title under a quitclaim deed from the record owner and by adverse possession, could not challenge the validity of such patent on the ground of grossly inadequate consideration, since the validity of a patent from the state can be challenged only in a proceeding instituted for that purpose by the state land commissioner on behalf of the state. *Comfort v. Landrum*, 52 So. 2d 658 (Miss. 1951).

The mere fact that the treasurer's receipt for the purchase price of land was not on file more than ten years after the issuance of a patent was not sufficient alone to overturn the solemn recitals of the patent as to its payment. *State ex rel. McCullen v. Sproles*, 200 Miss. 678, 28 So. 2d 218 (1946).

The phrase "without payment of purchase price," would be construed to mean a purchase price not so grossly inadequate as to amount to a donation of the land from the state to the patentee in contravention of the constitutional provision (§ 95) prohibiting the donation, directly or indirectly, to individuals or corporations, of any of the land belonging to, or under the control of the state. *State v. Roell*, 192 Miss. 873, 7 So. 2d 867 (1942).

4. Errors or omissions.

Record evidence, such as the deed record and assessment rolls, are competent in aid and clarification of the descrip-

tion of land sold at tax sale, so that such evidence may save the tax sale even though otherwise it would be invalid because of indefinite description. *Simmons v. State*, 199 Miss. 271, 24 So. 2d 660 (1946).

Where tax sale to state was illegal because of indefinite description of the land so that the state acquired no title thereby, title of claimant under patent from state could not be quieted and confirmed as between claimant and the state, although the state alone was made a party respondent and the state conveyed by the patent what it got under the tax sale. *Simmons v. State*, 199 Miss. 271, 24 So. 2d 660 (1946).

Description of land in tax sale to the state as the NE $\frac{1}{4}$ of the NE $\frac{1}{4}$ "less 2a" in a designated section, township, and range, was too indefinite and the tax sale was consequently illegal, unless the description could be aided and clarified by record evidence, such as the deed records and assessment rolls. *Simmons v. State*, 199 Miss. 271, 24 So. 2d 660 (1946).

Assessment description of certain lands as "N W $\frac{1}{4}$ S W $\frac{1}{4}$, less 6A, Section 2, Township 2, Range 18," although containing patent ambiguity by reason of the statement "less 6A," did not render the tax

sale to the state void because of indefinite description where the tax conveyance to the state contained a clue, which traced through the assessment rolls and the deeds of conveyance, ultimately led to a definite description of excepted 6 acres, the assessment rolls and deeds of conveyance being admissible in evidence to clarify the ambiguity. *Jefferson v. Walker*, 199 Miss. 705, 24 So. 2d 343 (1946), error overruled, 199 Miss. 725, 26 So. 2d 239 (1946).

The words "errors or omissions or incorrect statements in said application," contained in the final provision hereof, should be construed to mean errors, omissions or incorrect statements not amounting to fraud, within the meaning of the statute, since the preceding portion of this section authorizes the court upon the hearing of such cases to refuse to validate or perfect the title in the complainant where actual fraud has been perpetrated upon the state in obtaining the patent, and directs the granting of affirmative relief to the state in such case, rather than to permit a donation of the land in violation of the Constitution. *State v. Roell*, 192 Miss. 873, 7 So. 2d 867 (1942).

RESEARCH REFERENCES

Am Jur. 27A Am. Jur. 2d, Equity § 6.
37 Am. Jur. 2d, Fraud and Deceit
§§ 198-199.

CJS. 30 C.J.S., Equity §§ 50-53.

§ 11-17-11. Confirmation of state land patents; appeals.

Any of the parties to the suit may appeal as in other proceedings in chancery, provided any interlocutory appeal is taken within ten days after the rendition of the decree from which the appeal is desired, and provided that any final appeal is taken within sixty days from the date of the rendition of the final decree.

SOURCES: Codes, 1942, § 1318; Laws, 1940, ch. 309.

Cross References — Appeals from final decree, see § 11-51-3.

Procedural rules applicable to civil actions, see Miss. R. Civ. P. 1 et seq.

RESEARCH REFERENCES

Am Jur. 27A Am. Jur. 2d, Equity
§§ 198, 199.

§ 11-17-13. Confirmation of state land patents; res judicata.

Any land patent and title perfected by a decree in a suit under Sections 11-17-3 through 11-17-17 shall forever estop and preclude the state and other parties from thereafter questioning the validity of the patent involved in such proceeding.

SOURCES: Codes, 1942, § 1319; Laws, 1940, ch. 309.

Cross References — Procedural rules applicable to civil actions, see Miss. R. Civ. P. 1 et seq.

JUDICIAL DECISIONS

1. In general.

Defendant in a quiet title action could not challenge the validity of a patent from the state to tax forfeited land on the ground that the consideration therefor was grossly inadequate where, in a prior action by plaintiff to confirm his title, the chancery court had adjudicated that the patent from the state to the plaintiff was valid and confirmed the plaintiff's title against the state. *Comfort v. Landrum*, 52 So. 2d 658 (Miss. 1951).

Decree in a confirmation suit adjudicating the validity of a patent from the state to tax forfeited land, which did not purport to affect claims of defendant in a subsequent quiet title action either by adverse possession or under a quitclaim deed from the owner at the time of the tax sale, does not preclude such defendant from asserting adverse possession or invalidity of the tax sale. *Comfort v. Landrum*, 52 So. 2d 658 (Miss. 1951).

RESEARCH REFERENCES

ALR. Admissibility of evidence of, or propriety of comment as to, plaintiff-spouse's remarriage, or possibility thereof,

in action for damages for death of other spouse. 88 A.L.R.3d 926.

Am Jur. 27A Am. Jur. 2d, Equity § 190.

§ 11-17-15. Confirmation of state land patents; duty of district attorney and county attorney.

It is hereby made the duty of the district attorneys and county attorneys in their respective jurisdictions to fully cooperate with the attorney general in the investigation and trial of all cases filed under Sections 11-17-3 through 11-17-17; and, at the request of the attorney general, such officers shall investigate the facts involved and file such answers and perform such other reasonable services in connection therewith as the attorney general may request.

SOURCES: Codes, 1942, § 1320; Laws, 1940, ch. 309.

Cross References — Authority of attorney general to require assistance of district attorney, see § 7-5-37.

Procedural rules applicable to civil actions, see Miss. R. Civ. P. 1 et seq.

RESEARCH REFERENCES

ALR. Construction of "marketable title," ancient claims extinguishment," and like statutes, terminating or limiting enforcement of claims respecting real prop-

erty, based on old records, instruments, or events. 71 A.L.R.2d 846.

Am Jur. 27 Am. Jur. 2d, Equity § 55.
CJS. 30 C.J.S., Equity § 86.

§ 11-17-17. Confirmation of state land patents; construction of Sections 11-17-3 through 11-17-17.

Sections 11-17-3 through 11-17-17 shall be liberally construed to validate and quiet title to lands heretofore passing under patent from the state and shall in no way be construed as repealing or limiting any other statutes now existing in aid of such titles under patents from the state.

SOURCES: Codes, 1942, § 1321; Laws, 1940, ch. 309.

Cross References — Procedural rules applicable to civil actions, see Miss. R. Civ. P. 1 et seq.

JUDICIAL DECISIONS

1. In general.

Statutory provisions making it the duty of the courts to enter a decree validating and perfecting title based on tax-forfeited land patents, etc., were construed to be in keeping with the declared intention in this section that the same should be liberally construed to validate and quiet title to

such lands as had been theretofore patented, leaving the courts free and unhampered by any suggestions from the legislature in deciding such issues as might arise in suits to confirm and quiet title under patents thereafter issued. *State v. Lewis*, 192 Miss. 890, 7 So. 2d 871 (1942).

RESEARCH REFERENCES

Am Jur. 65 Am. Jur. 2d, Quieting Title and Determination of Adverse Claims §§ 1 et seq.

§ 11-17-19. Confirmation of title or interests granted by political subdivision.

Any person, firm or corporation which claims title to or a leasehold or other interest in any real property, other than sixteenth section school lands or lands granted in lieu thereof, under or by virtue of a sale, conveyance or lease of such property by any county, municipality, supervisor's district, or other political subdivision of the State of Mississippi, acting either separately or jointly, may proceed by sworn complaint in the chancery court of the county in which such real property, or some part thereof, is located, to have the title to or leasehold or other interest in such real property quieted and confirmed. Such action may be brought whether or not such person, firm or corporation be in possession of such real property, or whether he or it be threatened to be disturbed in such possession or not. In such complaint, the person, firm or

corporation claiming such title or leasehold or other interest shall be the party plaintiff and there shall be made defendants thereto the county, municipality or other political subdivision which sold, conveyed or leased said property, the Attorney General of the state and the district attorney of the county in which said suit is filed. In any such suit, it shall not be necessary that the plaintiff therein deraign his title to said property.

SOURCES: Codes, 1942, § 1322-01; Laws, 1954, ch. 248, § 1; Laws, 1991, ch. 573, § 34, eff from and after July 1, 1991.

Cross References — Procedural rules applicable to civil actions, see Miss. R. Civ. P. 1 et seq.

RESEARCH REFERENCES

Am Jur. 27A Am. Jur. 2d, Equity §§ 30, termination of Adverse Claims §§ 1 et seq.
34-37.
65 Am. Jur. 2d, Quieting Title and De- **CJS.** 30 C.J.S., Equity § 86.

§ 11-17-21. Proceedings in suit for confirmation of title granted by political subdivision; defaults.

All proceedings in said suit shall be governed by the Mississippi Rules of Civil Procedure. However, no default judgment shall be entered against the defendants unless the court determines the truth of the averments after a hearing pursuant to the Mississippi Rules of Civil Procedure.

SOURCES: Codes, 1942, § 1322-02; Laws, 1954, ch. 248, § 2; Laws, 1991, ch. 573, § 35, eff from and after July 1, 1991.

Cross References — Procedural rules applicable to civil actions, see Miss. R. Civ. P. 1 et seq.

RESEARCH REFERENCES

Am Jur. 27A Am. Jur. 2d, Equity §§ 30, termination of Adverse Claims §§ 1 et seq.
34-37.
65 Am. Jur. 2d, Quieting Title and De- **CJS.** 30 C.J.S., Equity §§ 84-86.

§ 11-17-23. Confirmation of title or interest granted by political subdivision; decree; res judicata.

In all such proceedings the court shall find whether the sale, conveyance or lease of such real property was lawful and valid. Upon the hearing of such case, the chancery court shall enter a decree validating and confirming the complainant's title to or leasehold or other interest in such real property as against the defendants in said suit, unless it shall appear to the court and the court shall find that the title thereto or leasehold or other interest therein was not lawfully and validly acquired by virtue of the sale, conveyance or lease under which such complainant claims, in which latter case the chancery court shall enter a decree annulling and cancelling such sale, conveyance or lease, or

such other decree as the court may find to be lawful, just and equitable in such case. When any sale, conveyance or lease of any such property shall be confirmed and validated under the provisions of Sections 11-17-19 through 11-17-27 by decree of the chancery court, such decree shall forever estop and preclude the defendants and all other parties from thereafter questioning the validity of the sale, conveyance or lease involved in such proceedings.

SOURCES: Codes, 1942, § 1322-03; Laws, 1954, ch. 248, § 3.

Cross References — Procedural rules applicable to civil actions, see Miss. R. Civ. P. 1 et seq.

RESEARCH REFERENCES

Am Jur. 27A Am. Jur. 2d, Equity § 190.
65 Am. Jur. 2d, Quieting Title and Determination of Adverse Claims §§ 64-67.

§ 11-17-25. Confirmation of title or interest granted by political subdivision; appeals.

Any of the parties to a confirmation suit filed under the provisions of Sections 11-17-19 through 11-17-27 may appeal from the decree of the chancery court in the manner and within the time provided by law, and such appeals shall be heard as are other cases of appeals from the decrees of the chancery court.

SOURCES: Codes, 1942, § 1322-04; Laws, 1954, ch. 248, § 4.

Cross References — Appeal from final decree, see § 11-51-3.
Appeal from final decree, see § 11-51-3.
Procedural rules applicable to civil actions, see Miss. R. Civ. P. 1 et seq.

RESEARCH REFERENCES

Am Jur. 27 Am. Jur. 2d, Equity §§ 173.

§ 11-17-27. Confirmation of title or interest granted by political subdivision; applicability of Sections 11-17-19 through 11-17-27.

Sections 11-17-19 through 11-17-27 shall be applicable to all sales, conveyances and leases of real property, other than sixteenth section school lands or lands granted in lieu thereof, made by any county, municipality, supervisor's district or other political subdivision of the State of Mississippi, acting either jointly or separately, to any person, firm or corporation, including, but not being limited to, sales, conveyances and leases made under the authority of Sections 57-1-1 through 57-1-51, any other statute of the State of Mississippi, whether same be general, special or local and private, and sales, conveyances and leases made under the general authority of counties, munic-

ipalities, and other political subdivisions, whether same were authorized by a specific statute or not.

SOURCES: Codes, 1942, § 1322-05; Laws, 1954, ch. 248, § 5.

Cross References — Sales, conveyances, and leases executed by agricultural and industrial board, see §§ 57-1-1 et seq.

Procedural rules applicable to civil actions, see Miss. R. Civ. P. 1 et seq.

§ 11-17-29. Any other title may be confirmed.

The owner in possession of any land, or the owner thereof who may be out of possession, if there be no adverse occupancy thereof, may file a bill in the chancery court to have his title confirmed and quieted. The law for notice, process, proceedings, and practice, as provided for confirming and quieting tax titles shall apply, no matter by what tenure the complainant may hold. Unknown and nonresident parties may be made defendants as they are made defendants to proceedings to confirm tax titles. If on the final hearing of any such suit, the court shall be satisfied that the complainant is the real owner of the land, it shall so adjudge, and its decree shall be conclusive evidence of title as determined from the date of the decree as against all parties defendant.

SOURCES: Codes, 1892, § 499; Laws, 1906, § 549; Hemingway's 1917, § 306; Laws, 1930, § 403; Laws, 1942, § 1323.

Cross References — The constitutional jurisdiction of the chancery court to decree title to land, see Miss. Const. Art. 6, § 160.

Proceedings to confirm tax titles, see § 11-17-1.

Necessity to deraign title, see § 11-17-35.

Jurisdiction to determine controverted title in action for partition of property, see § 11-21-9.

Limitations of actions concerning land, see §§ 15-1-7, 15-1-9.

Procedure to establish title if records are lost or destroyed, see § 25-55-31.

Application of this section to action challenging location of public trust tideland boundaries, see § 29-15-7.

Conveyances of land, generally, see §§ 89-1-1 et seq.

Procedural rules applicable to civil actions, see Miss. R. Civ. P. 1 et seq.

JUDICIAL DECISIONS

1. Right to maintain suit to confirm title.
2. —Persons entitled.
3. —Title in complainant.
4. Proceedings in general.
5. —Pleading.
6. —Evidence.
7. —Decree.
8. Res judicata.

1. Right to maintain suit to confirm title.

Although generally a suit to confirm title may not be brought if there is a party

defendant in possession of the land, a bill of complaint containing not only a prayer for confirmation of title but also a prayer for cancellation of adverse claims and the issuance of an injunction removing one in possession from the premises was not a simple bill to confirm title, and a motion to dismiss was properly overruled. *Yellow Cab & Car Rental Co. v. Dependents of Lecamu*, 207 So. 2d 604 (Miss. 1968).

Where an action was brought to determine the rights of owners to the minerals, and the land involved was subject to rail-

road right of way, and owners of adjoining lands by right of adverse possession were in possession of subsurface minerals under the right of way, the action is one to remove clouds on title rather than suit to quiet and confirm title. *Jones v. New Orleans & N.R. Co.*, 214 Miss. 804, 59 So. 2d 541 (1952).

Bill to establish and quiet title to land in lieu of an ordinary action at law in ejectment can properly be maintained only when the land is not in possession of one claiming adversely to the complainant. *White v. Turner*, 197 Miss. 265, 19 So. 2d 825 (1944); *Hume v. Inglis*, 154 Miss. 481, 122 So. 535 (1929).

Under this section [Code 1942, § 1323] a complainant cannot maintain a suit to confirm her title to land, where the land is occupied by the defendant at the time, it being essential that the complainant show either that she is in possession of the land, or that she is the owner and the land is unoccupied. *Broome v. Jackson*, 193 Miss. 66, 7 So. 2d 829 (1942), error overruled, 193 Miss. 75, 8 So. 2d 245 (1942).

Where a complainant's husband deserted her in 1920, while they resided on and occupied certain land as their home, and the wife continued to occupy the land as her home and to claim it until 1934, when she was forced out of possession by the defendant, she established a claim of title by adverse possession, which enabled her to maintain a suit to recover possession and remove the cloud upon her title. *Broome v. Jackson*, 193 Miss. 66, 7 So. 2d 829 (1942), error overruled, 193 Miss. 75, 8 So. 2d 245 (1942).

Where the entire record of a former suit brought by complainant against defendants and others to confirm her title in the land in question, which record was made a part of the instant suit, showed that the complainant claimed to be in possession and that there was no adverse possession as against allegations to the contrary, and her amended bill in the instant action for damages for the taking of timber from such land, and to obtain a writ of possession and other relief, showed not only a tax sale as foundation for her title but also a deed of trust from defendant, with foreclosure thereof and mesne conveyances to complainant as another source of title, the

action was one within the class to confirm title under this section [Code 1942, § 1323]. *Norton v. Graham*, 185 Miss. 164, 187 So. 510 (1939), error overruled, 185 Miss. 188, 188 So. 314 (1939).

Complainant must show that he is in actual possession of the land or that there is no adverse possession. *Gambrell Lumber Co. v. Saratoga Lumber Co.*, 87 Miss. 773, 40 So. 485 (1906).

2. —Persons entitled.

A suit to confirm title to land may not be brought if there is a party defendant in possession, and the bill must show that either complainant is in the actual occupancy of the land, or if out of possession, that there is no actual adverse occupancy. *Allen v. Thomas*, 215 So. 2d 882 (Miss. 1968).

One who has been in adverse possession for ten years by exchange of lands with another, claiming to be the owner from that time, may maintain a bill to have his title confirmed. *Bynum v. Stinson*, 81 Miss. 25, 32 So. 910 (1902).

The owner of a leasehold interest in a sixteenth section may maintain a bill under this section [Code 1942, § 1323]. *Osburn v. Board of Supvrs.*, 71 Miss. 19, 14 So. 457 (1893).

3. —Title in complainant.

In a suit to confirm title to land and cancel and remove as a cloud on the title to the land adverse claims thereto, and for possession and rent, the complainant was required to show a good title in herself. *Broome v. Jackson*, 193 Miss. 66, 7 So. 2d 829 (1942), error overruled, 193 Miss. 75, 8 So. 2d 245 (1942).

Complainant has burden of showing perfect title in himself to maintain bill to remove clouds and establish his title to land. *Nicholson v. Myres*, 170 Miss. 441, 154 So. 282 (1934).

Complainant in bill to confirm title and remove clouds must show good title in himself. *Camp v. Celtic Land & Imp. Co.*, 129 Miss. 417, 91 So. 897 (1922).

4. Proceedings in general.

Where certain issues of fact required determination, an interlocutory appeal was improvidently granted from an order overruling defendant's pleas in bar filed in

an action to confirm a tax title. *Calmes v. Weill*, 216 So. 2d 418 (Miss. 1968).

Although the Supreme Court would not reverse a decree confirming title to a slip or canal in the complainant merely because the complainant did not deraign title to himself as required by § 1325, Code of 1942, or give a good and valid reason why he did not do so, since the proof showed that title came from a common source, reversal was required where complainant failed to deraign title from the common source to the necessary parties to the suit, and his bill did not allege that the complainant had joined in the suit all parties interested in the land so far as known to him and could be ascertained by diligent inquiry, and where one of the owners of one of the tracts purchased from the common source involved in the action had not been made a party thereto. *Warren v. Clark*, 230 Miss. 873, 94 So. 2d 323 (1957).

Where defendants in a suit for determination of title to real estate filed cross-bills for confirmation of title in them, predicated on adverse possession and deeds other than those relied on by complainants, complainants had no right to dismiss without prejudice and at the same time secure dismissals of the cross-bills without the consent, express or implied, of the cross-complainants. *Hudson v. Gulf Ref. Co.*, 202 Miss. 331, 30 So. 2d 66 (1947), motion overruled, 202 Miss. 331, 30 So. 2d 421 (1947), cert. denied, 332 U.S. 775, 68 S. Ct. 84, 92 L. Ed. 359 (1947).

A prior decree purporting to confirm defendant's title to the land in litigation in an action to which the complainant was not made a party except as he may have been such under a general notice published as process "to all persons having or claiming any interest" is void as to complainant, where the latter on the date the prior suit was filed was in actual possession of the land and defendant had other knowledge of complainant's adverse claim thereto, notwithstanding that complainant knew of the suit but paid no attention to it. *Skrmetta v. Moore*, 202 Miss. 585, 30 So. 2d 53 (1947), but see *Mitchell v. Rawls*, 493 So. 2d 361 (Miss. 1986).

One exercising such acts of occupancy or dominion over land as to give ample

notice that his possession and acts are adverse to the claimant is not bound by general notice published as process "to all persons having or claiming any interest," even though he knows of the suit. *Skrmetta v. Moore*, 202 Miss. 585, 30 So. 2d 53 (1947), but see *Mitchell v. Rawls*, 493 So. 2d 361 (Miss. 1986).

Complainant may dismiss as to one or more defendants. *Wilson v. Foster Creek Lumber & Mfg. Co.*, 134 Miss. 880, 99 So. 437 (1924).

Where court refused to amend bill inadvertently brought under Code 1906 § 549 instead of § 550, complainant should be allowed to dismiss without prejudice. *Russell v. Denson*, 98 Miss. 859, 54 So. 439 (1911).

5. —Pleading.

Complaint in suit to confirm title to land under patent from state issued to plaintiff which did not allege that plaintiff was in possession of the land, or that there was no adverse occupancy, was demurrable, since such allegation is necessary in suit to confirm title other than tax title. *Easterling v. Howie*, 179 Miss. 680, 176 So. 585 (1937).

Bill to quiet title alleging former suit for partition and sale was fraudulent and not by the then owners or their legal representatives, and that plaintiffs were not parties, states a good cause of action. *Moore v. Luke*, 110 Miss. 205, 70 So. 84 (1915).

Cross-bill need not aver cross-complainants were in possession, or no adverse possession. *Smith v. Jassen*, 105 Miss. 227, 62 So. 172 (1913).

6. —Evidence.

The presumption that land has been granted to the possessor by the state arises where there is some unexplained anomaly in the chain of title; however, this principle should not be construed to mean that the presumption arises only in the face of such an anomaly. The open and continuous possession of property by the claimants and their predecessors in title from 1892 to the present, together with the usual acts incident to ownership, were sufficient to raise the presumption of a grant. *Board of Trustees v. Rye*, 521 So. 2d 900 (Miss. 1988).

In suit to confirm title to land in which answer sets up ownership by defendants of part of land by adverse possession, proof by defendants as to land adversely possessed by them is admissible, and proper description thereof can be obtained by survey. *Chatman v. Carter*, 209 Miss. 16, 45 So. 2d 841 (1950).

In suit by heirs to confirm title to 46 acres of land, 15 acres of which defendants claimed through parol gift from complainants' decedent to defendants' deceased predecessor in title which merged with subsequent adverse possession against estate of complainants' decedent, defendants should not be permitted to testify with reference to what was said in making gift of the land and pointing out boundaries as these statements went to question of establishing defendants' claims against estate of decedent. *Chatman v. Carter*, 209 Miss. 16, 45 So. 2d 841 (1950).

Evidence held not to show continuous actual possession and occupation for statutory period. *Dedeaux v. Bayou Delisle Lumber Co.*, 112 Miss. 325, 73 So. 53 (1916).

7. —Decree.

Where in a suit to confirm a tax sale, § 1314, Code of 1942 and this section [Code 1942, § 1323], as to special process, had not been complied with, and although it was charged that one of the defendants was residing in the state of Georgia, the bill failed to charge that she was a non-resident of Mississippi, and neither the owner of title at the time of the tax sale, if living, nor his heirs, if he was dead, were made parties, the confirmation decree rendered therein was void. *White v. Merchants & Planters Bank*, 229 Miss. 35, 90 So. 2d 11 (1956).

Decree in suit to confirm title to 46 acres of land that "complainants have no claim, right, title and interest to the land described in the bill of complaint filed herein" is reversible error when defendants claimed interest in only 15 acres and complainant's title to 31 acres was not attacked. *Chatman v. Carter*, 209 Miss. 16, 45 So. 2d 841 (1950).

Where a suit to confirm title was decided upon general demurrer which was sustained for failure of complainant to

show title in himself, the decision was upon the merits as to complainant's want of title. *Williams v. Patterson*, 203 Miss. 865, 34 So. 2d 366 (1948).

False allegation that there is no adverse possession is a fraud on the court; decree confirming title is void as to defendant in adverse possession where complainant does not proceed under Code 1906, § 550 to have such claim cancelled. *Brooks-Scanlon Co. v. Stogner*, 114 Miss. 736, 75 So. 596 (1917).

8. Res judicata.

On a bill of complaint by an innocent purchaser for value without notice to confirm, and to quiet title to a tract of land, a prior quiet title action by the purchaser's predecessor concerning the same tract against the same defendants before the same chancellor who quieted title in the predecessor, was res judicata as to the title to the property. *Fairley v. Tucker*, 253 So. 2d 852 (Miss. 1971).

Where a plaintiff in ejectment suit made the same allegations as to right of possession as those made in prior suit for confirmation of title, which was adjudicated against him for failure to show title in himself, decision in confirmation suit was res judicata in ejectment suit. *Williams v. Patterson*, 203 Miss. 865, 34 So. 2d 366 (1948).

In an action to confirm title and remove clouds, as against defendants' claim of adverse possession and that the period of adverse possession was not interrupted by a decree in a former suit to which the defendants were parties for confirmation of complainant's tax title on the ground that the issue of adverse possession was not involved therein, allegations in the former suit, the record of which was made part of the instant suit, that complainant was in possession and that there was no adverse possession, with defendants' allegations to the contrary, put in issue the defendants' claim of adverse possession and such issue was concluded by the decree in the former suit, foreclosing further inquiry, since the matters existing at the time of the former suit under this section [Code 1942, § 1323] concluded the title as of the date of the decree and not as of the

date of the tax sale from which complainant derived title. *Norton v. Graham*, 185

Miss. 164, 187 So. 510 (1939), error overruled, 185 Miss. 188, 188 So. 314 (1939).

RESEARCH REFERENCES

ALR. Construction of "marketable title," "ancient claims extinguishment," and like statutes, terminating or limiting enforcement of claims respecting real property, based on old records, instruments, or events. 71 A.L.R.2d 846.

Am Jur. 27A Am. Jur. 2d, Equity § 55. 65 Am. Jur. 2d, Quieting Title and De-

termination of Adverse Claims §§ 1 et seq.

20 Am. Jur. Pl & Pr Forms (Rev), Quieting Title and Determination of Adverse Claims, Forms 1-115 (Proceedings to quiet title).

CJS. 30 C.J.S., Equity § 86.

§ 11-17-31. Removing clouds upon titles.

When a person not the rightful owner of any real estate, shall have any conveyance or other evidence of title thereto, or shall assert any claim, or pretend to have any right of title thereto, which may cast doubt, or suspicion on the title of the real owner, such real owner may file a bill in the chancery court to have such conveyance or other evidence or claim of title cancelled, and such cloud, doubt or suspicion removed from said title, whether such real owner be in possession or not, or be threatened to be disturbed in his possession or not, and whether the defendant be a resident of this state or not. Any person having the equitable title to land may, in like cases, file a bill to divest the legal title out of the person in whom the same may be vested, and to vest the same in the equitable owner. Any person holding or claiming under a tax title lands heretofore or hereafter sold for taxes may proceed hereunder in like manner and may include, as a defendant, any political subdivision of the state, having or asserting any evidence or claim of title adverse to such tax title.

SOURCES: Codes, *Hutchinson's* 1848, ch. 54, art. 16 (1); 1857, ch. 62, art. 8; 1871, § 975; 1880, § 1833; 1892, § 500; Laws, 1906, § 550; *Hemingway's* 1917, § 307; Laws, 1930, § 404; Laws, 1942, § 1324; Laws, 1948, ch. 226.

Cross References — Constitutional jurisdiction to decree title to land, see Miss. Const. Art. 6, § 160.

Necessity to deraign title, see § 11-17-35.

Limitation of actions concerning title to land, see §§ 15-1-7, 15-1-9.

Procedural rules applicable to civil actions, see Mississippi Rules of Civil Procedure, Rules 1 et seq.

JUDICIAL DECISIONS

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| 1. Jurisdiction. | 7. Pleading. |
| 2. —Removal to federal court. | 8. Evidence. |
| 3. Right and propriety of action. | 9. Burden of proof. |
| 4. —Title in complainant. | 10. Relief granted. |
| 5. —Actions by or against particular persons. | 11. Judgment or decree. |
| 6. Parties. | 12. Injunction in aid of remedy. |
| | 13. Res adjudicata. |

1. Jurisdiction.

Chancery court is without jurisdiction of bill by owners of land seeking cancellation of claim of state to lands by reason of pretended tax sales as cloud upon complainants' title after land commissioner, with written approval of attorney general, acting under § 4073, Code 1942, providing for cancellation of claim of state to lands under tax sales when sales are void, has stricken lands from lists of lands sold to state for delinquent taxes because sales were void, since adjudication sought is, in effect, merely ratification of legal action of a state official, lawfully empowered to act, and statute does not provide for ratification by court. *State v. Southern Pine Co.*, 205 Miss. 80, 38 So. 2d 442 (1949).

Where in a suit to enjoin the defendants from foreclosing a deed of trust and to cancel such deed of trust as a cloud upon complainants' title, title to that part of the land covered by the deed of trust situated in the county in which the suit was brought had, at the time suit was brought, matured in the state under tax sales, and the defendants moved to dismiss the suit because the court had no territorial jurisdiction in that the rest of the land was situated in another county, but the suit was dismissed on another ground urged in such motion, defendants' failure on complainants' appeal from dismissal to urge the point that suit could not be maintained in county other than that in which land was situated, constituted waiver of the point. *Ravesies v. Martin*, 190 Miss. 92, 199 So. 282 (1940).

A suit to cancel a claim against land as a cloud upon the title, where the property is in possession of the complainant and the court is not asked to make any disposition thereof, should not be held to be a proceeding purely in rem in the sense that a court would be wholly without jurisdiction in a county other than where the land is situated. *Ravesies v. Martin*, 190 Miss. 92, 199 So. 282 (1940).

The statute enlarges the jurisdiction for the purposes of quia timet bills, and must be construed in the light of the doctrines and principles pertaining thereto. *Carlisle v. Tindall*, 49 Miss. 229 (1873).

2. —Removal to federal court.

Federal district courts, under Judicial Code § 57, have jurisdiction of suits to

remove clouds on title in case of nonresident defendants. *Louisville & N.R.R. v. Western Union Tel. Co.*, 234 U.S. 369, 34 S. Ct. 810, 58 L. Ed. 1356 (1914).

A suit to remove clouds from titles to land is not within the exclusive jurisdiction of the state courts and may be removed, if the citizenship of the parties justifies it, into the federal court. *Day v. Oatis*, 85 Miss. 128, 37 So. 559 (1904).

3. Right and propriety of action.

A property owner is entitled to have a void tax deed set aside as a cloud upon the owner's title. *Parsons v. Marshall*, 243 Miss. 719, 139 So. 2d 833 (1962).

Where an action was brought to determine the rights of owners to the minerals, and the land involved was subject to railroad right of way, and owners of adjoining lands by right of adverse possession were in possession of subsurface minerals under the right of way, the action is one to remove the cloud on title rather than suit to quiet and confirm title. *Jones v. New Orleans & N.R. Co.*, 214 Miss. 804, 59 So. 2d 541 (1952).

In suit to remove cloud upon title, mere improvident contract supplies no basis for relief. *Hunt v. Davis*, 208 Miss. 710, 45 So. 2d 350 (1950).

In action to remove cloud from title based on unilateral mistake of grantor in description of mineral rights conveyed, mistake to constitute equitable relief must not be merely result of inattention, personal negligence, or misconduct on part of party applying for relief. *Hunt v. Davis*, 208 Miss. 710, 45 So. 2d 350 (1950).

Unilateral mistake on part of grantor, either as to number of acres under which he owned mineral interest or as to fractional interest in minerals owned, will not support cross-bill to cancel title of grantee to one-fourth of minerals when grantor conveyed one-half of minerals under the land, which was all that grantor owned. *Hunt v. Davis*, 208 Miss. 710, 45 So. 2d 350 (1950).

An asserted claim of title by adverse possession alone may be a cloud on title within the purview of this section [Code 1942, § 1324] where the same is insufficient in character and duration to satisfy the applicable statute of limitations.

Church of the Living God, C.W.F.F. v. Curry, 203 Miss. 279, 34 So. 2d 494 (1948).

Taking possession of real property and demolishing and removing the improvements thereon is such an assertion of some claim of right as to have such possession and use cancelled as a cloud upon title. Church of the Living God, C.W.F.F. v. Curry, 203 Miss. 279, 34 So. 2d 494 (1948).

Even though an instrument void on its face may be impotent to do practical harm to the title, an action may be brought to cancel it as a cloud on the title. Silvey v. Upton, 202 Miss. 485, 32 So. 2d 267 (1947).

An action to remove cloud on title was properly brought against a municipality by the holder of a tax deed issued by an administration under a procedure different from that adopted by a succeeding administration which had sometimes required the payment of an additional price from the holders of similar deeds. Evans v. City of Jackson, 201 Miss. 14, 28 So. 2d 249 (1946).

Even though the state acquires no title under an invalid tax sale, such constitutes a cloud upon the title of the rightful owner which he may have cancelled and removed. State v. Butler, 197 Miss. 218, 21 So. 2d 650 (1945).

Possession of the land by complainants, or nonoccupancy of the land, is not a condition precedent to the maintenance of an action to remove a cloud upon the title to the land. Broome v. Jackson, 193 Miss. 66, 7 So. 2d 829 (1942), error overruled, 193 Miss. 75, 8 So. 2d 245 (1942).

Where a complainant's husband deserted her in 1920, while they resided on and occupied certain land as their home, and the wife continued to occupy the land as her home and to claim it until 1934, when she was forced out of possession by the defendant, she established a claim of title by adverse possession, which enabled her to maintain a suit to recover possession and remove the cloud upon her title. Broome v. Jackson, 193 Miss. 66, 7 So. 2d 829 (1942), error overruled, 193 Miss. 75, 8 So. 2d 245 (1942).

As respects constitutionality of statute providing that action attacking validity of tax sale to state must be brought within two years after land is sold or forfeited to

state, fact that statute ran concurrently with portion of period of redemption was immaterial since its effect was not to shorten redemption period and taxpayer was authorized to institute, prior to expiration of period of limitation, a suit to cancel claim of state's patentee as a cloud on his title, whether taxpayer was in possession or not, or whether he was threatened to be disturbed in his possession. Russell Inv. Corp. v. Russell, 182 Miss. 385, 178 So. 815 (1938), suggestion of error overruled, 182 Miss. 385, 182 So. 102 (1938).

This statute must be regarded as entitling the rightful owner of real property in the state to maintain a suit to dispel a cloud cast upon his title by an invalid deed or any other instrument, even though it be one which, when tested by applicable legal principles, is void upon its face. Louisville & N.R.R. v. Western Union Tel. Co., 234 U.S. 369, 34 S. Ct. 810, 58 L. Ed. 1356 (1914).

Where court refused to amend bill inadvertently brought under Code 1906 § 549 instead of § 550, complainant should be allowed to dismiss suit without prejudice. Russell v. Denson, 98 Miss. 859, 54 So. 439 (1911).

Suit for removal of cloud will lie whether the cloud be cast by written instrument or mere assertion of a hostile claim; in either case bill must show complainant's good title and facts showing invalidity of defendant's title if they be known. Gambrell Lumber Co. v. Saratoga Lumber Co., 87 Miss. 773, 40 So. 485 (1906).

Under the facts stated, complainant was held entitled to maintain a bill to cancel or, in the alternative, to have a lien decreed in his favor. Gentry v. Gamblin, 79 Miss. 437, 28 So. 809 (1900).

Clouds may be removed from the reversionary interest in land by the real owner thereof, before the expiration of the particular estate. Fox v. Coon, 64 Miss. 465, 1 So. 629 (1887).

The real owner can file a bill to cancel a paper-title, or a bill for protection against a pretense of title. Cook v. Friley, 61 Miss. 1 (1883).

A bill in chancery can be maintained by the real owner out of possession against a

person in possession, to cancel a void tax-deed and a title-bond from one who never had title. *Wofford v. Bailey*, 57 Miss. 239 (1879).

If the person owning the legal title be estopped to assert it as against complainant, who has a perfect equitable title, the latter may cancel the legal title as a cloud. *Shivers v. Simmons*, 54 Miss. 520, 28 Am. R. 372 (1877).

4. —Title in complainant.

A deed which conveyed to a woman her two sons' interest in a piece of land and provided that the deed was made with the full knowledge and understanding of the parties concerned and that, on the mother's death, title to the property would revert to one of the two sons was insufficient to transfer the interest of one brother to the other and upon the mother's death each son was entitled to that portion of the property which he had conveyed to the mother as a life tenant. *Avera v. Avera*, 341 So. 2d 654 (Miss. 1977).

A bill to quiet title should not have been dismissed as to that part of the land to which the complainant had record title, his right to which was contested by a cross-bill setting forth alleged, but not proved, title by adverse possession. *Colotta v. Middleton*, 201 Miss. 637, 28 So. 2d 847 (1947), motion granted, 201 Miss. 646, 30 So. 2d 90 (1947).

In a suit to confirm title to land and cancel and remove as a cloud on the title to the land adverse claims thereto, and for possession and rent, the complainant was required to show a good title in herself. *Broome v. Jackson*, 193 Miss. 66, 7 So. 2d 829 (1942), error overruled, 193 Miss. 75, 8 So. 2d 245 (1942).

Where the entire record of a former suit brought by complainant against defendants and others to confirm her title in the land in question, which record was made a part of the instant suit, showed that complainant claimed to be in possession and that there was no adverse possession as against allegations therein to the contrary, and her amended bill in the instant suit for damages for the taking of timber from such land, to obtain a writ of possession and other relief, showed not only a tax sale as foundation for her title but also a deed of trust from defendant, with fore-

closure thereof and mesne conveyances to complainant as another source of title, the present action was one within the purview of this section [Code 1942, § 1324] in view of allegations of the bill as to title set out in the original bill, as constituting a cloud upon the complainant's title. *Norton v. Graham*, 185 Miss. 164, 187 So. 510 (1939), error overruled, 185 Miss. 188, 188 So. 314 (1939).

Bill to cancel contract for sale of timber land is within Code 1906 §§ 550, 551, and complainant must deraign title. *Eastman v. Wyatt Lumber Co.*, 102 Miss. 313, 59 So. 93 (1912).

Under this section [Code 1942, § 1324] complainants must show a perfect legal or equitable title independently of defects in defendant's title. *Jones v. Rogers*, 85 Miss. 802, 38 So. 742 (1905), error dismissed, 214 U.S. 196, 529 S. Ct. 635, 3 L. Ed. 965 (1909); *Goff v. Avent*, 122 Miss. 86, 84 So. 134 (1920).

The doctrine of common source of title applies. *People's Bank v. West*, 67 Miss. 729, 7 So. 513 (1890).

Complainant must show as perfect a title, legal or equitable, as would enable him, the title being a legal one, to recover in an action of ejectment. *Chiles v. Gallagher*, 67 Miss. 413, 7 So. 208 (1889); *Wilkinson v. Hiller*, 71 Miss. 678, 14 So. 442 (1893).

The complainant must show himself to be the owner in law or in equity of the subject matter in dispute. *Hart v. Bloomfield*, 66 Miss. 100, 5 So. 620 (1888); *People's Bank v. West*, 67 Miss. 729, 7 So. 513 (1890).

Complainant must have a perfect legal or a perfect equitable title; and must show the invalidity of his adversary's claim. *Toulmin v. Heidelberg*, 32 Miss. 268 (1856); *Jayne v. Boisgerard*, 39 Miss. 796 (1861); *Huntington v. Allen*, 44 Miss. 654 (1870); *Handy v. Noonan*, 51 Miss. 166 (1875); *Griffin v. Harrison*, 52 Miss. 824 (1876).

The complainant must show the entire fairness of his own title. *Boyd v. Thornton*, 21 Miss. (13 S. & M.) 338 (1850).

5. —Actions by or against particular persons.

Action brought under Mississippi law to remove cloud upon title to real property is

action to quiet title to property on which United States has lien, for purposes of statute waiving sovereign immunity for such claims. *Norman v. United States*, 962 F. Supp. 936 (S.D. Miss. 1996).

Action in which Mississippi resident sought to reform deed of trust securing loan made by Farmers Home Administration (FHA) to remove his homestead and residence from deed was action to remove cloud on title under Mississippi statute, and thus came within waiver by United States of sovereign immunity under statute governing actions affecting real property on which United States has lien. *Norman v. United States*, 962 F. Supp. 936 (S.D. Miss. 1996).

Warranty deed conveying fee simple title, which contains clause making conveyance subject to reservation of oil, gas and other minerals by prior grantors will not be reformed to reflect intent of present grantor to reserve mineral rights. *Miller v. Lowery*, 468 So. 2d 865 (Miss. 1985).

An administratrix cannot bring suit to recover in her own name lands of the decedent in the absence of her showing a basis for her assumption of this prerogative of the heirs. *Clinton v. Robbins*, 32 So. 2d 145 (Miss. 1947).

The purchaser at a foreclosure sale under a trust deed is entitled to a decree quieting title as against the mortgagor's wife who obtained a forfeited tax land patent from the state pursuant to its purchase of the property after the foreclosure sale at tax sale for nonpayment of taxes assessed to the mortgagor. *Vincent v. J.W. McClintock, Inc.*, 200 Miss. 445, 27 So. 2d 681 (1946).

Under this section [Code 1942, § 1324] the owner of land out of possession can resort to an equity court to remove clouds and confirm title. *Dockery v. Zerkowsky*, 186 Miss. 31, 189 So. 797 (1939).

Members of state mineral lease commission which held void deeds to complainants' realty could be made defendants under statute authorizing cancellation suit by rightful owner against person holding invalid deeds, although commission had not taken actual possession of or trespassed upon realty. *State Mineral Lease Comm'n v. Lawrence*, 171 Miss. 442, 157 So. 897 (1934).

Rule that equity will not proceed until all parties whose interests will be substantially affected by decree are before court, and fact that state was real party in interest, did not preclude suit against members of state mineral lease commission to cancel void deeds to complainant's realty held by commission. *State Mineral Lease Comm'n v. Lawrence*, 171 Miss. 442, 157 So. 897 (1934).

Trustees under void trust are not entitled to maintain a suit to remove cloud from their title on theory that conveyance to them was absolute on failure of trust. *Board of Trustees of M.E. Church S. v. Odom*, 100 Miss. 64, 56 So. 314 (1911).

One granting right to plant and take oysters from a bay in front of certain property cannot maintain a bill to quiet his title to such rights. *Catchot v. Zeigler*, 92 Miss. 191, 45 So. 707 (1908).

Purchasers from a county cannot defend a suit by the county to cancel their deed on the ground that the county at the time of its purchase had no power to acquire the property. *Jefferson County v. Grafton*, 74 Miss. 435, 21 So. 247, 60 Am. St. R. 516 (1897).

A purchaser in possession, under a contract to convey to him, who has not paid the purchase money, cannot maintain a bill to cancel the claim of the vendor or representatives upon the ground that the statute of limitation has barred recovery either of the land or its price, unless he offers to pay the purchase money and interest. *Nolan v. Snodgrass*, 70 Miss. 794, 12 So. 583 (1893).

6. Parties.

Although the Supreme Court would not reverse a decree confirming title to a slip or canal in the complainant merely because the complainant did not deraign title to himself as required by § 1325, Code of 1942, or give a good and valid reason why he did not do so, since the proof showed that title came from a common source, reversal was required where complainant failed to deraign title from the common source to the necessary parties to the suit, and his bill did not allege that the complainant had joined in the suit all parties interested in the land so far as known to him and could be ascertained by diligent inquiry, and where one

of the owners of one of the tracts purchased from the common source involved in the action had not been made a party thereto. *Warren v. Clark*, 230 Miss. 873, 94 So. 2d 323 (1957).

As general rule all persons who are materially interested in event or subject matter, without whom no effective judgment or decree can be rendered, should be made parties in suit to quiet title. *Magnolia Textiles, Inc. v. Gillis*, 206 Miss. 797, 41 So. 2d 6 (1949).

One who enters into conditional contract with complainants in suit to quiet title, after litigation is started, to lease property if and when litigation is terminated in accordance with complainants' views, is not necessary party to suit as he is interested alone in outcome of litigation not inherently in subject matter of suit. *Magnolia Textiles, Inc. v. Gillis*, 206 Miss. 797, 41 So. 2d 6 (1949).

Either plaintiff or interveners, claiming title to plaintiff's undivided interest in oil land by reason of quitclaim deed from plaintiff subject to plaintiff's right to receive payment for oil produced from the land, were proper parties to maintain action to confirm title to such land and to set aside colessor's agreement executed by plaintiff. *White v. Union Producing Co.*, 140 F.2d 176 (5th Cir. 1944).

All parties interested may be made defendants so as to afford complete relief. *Goff v. Avent*, 129 Miss. 782, 93 So. 193 (1922).

A mortgagor who, by limitation, is barred of all equity of redemption and who has conveyed all interest in the land, is neither a necessary nor proper party to a bill to remove clouds. *Tuteur v. Brown*, 74 Miss. 774, 21 So. 748 (1897).

7. Pleading.

Chancellor does not abuse his discretion by allowing, after answer is filed, amendment to bill changing date of foreclosure sale from which date defendants claimed adversely, where effect of amendment was merely to increase burden upon defendants in establishing duration of period of their claimed adverse possession. *Duncan v. Mars*, 44 So. 2d 529 (Miss. 1950).

Demurrer on ground that there is no equity on face of cross-bill should be overruled when cross-bill, filed in suit founded

on former court decree, reviews history of former court proceeding setting out facts showing decree was void and did not affect title to land, partition of which is sought in original bill, and cross-bill prays that claim of cross-defendant be cancelled as cloud upon title of cross-complainant. *Natis v. Jackson*, 205 Miss. 490, 38 So. 2d 925 (1949).

One alleging that he and the defendant derived their title from a common source must show by proper allegation that his title from that source is the better. *Woodard v. Moss*, 202 Miss. 33, 30 So. 2d 420 (1947).

A bill alleging that title was derived from named persons who were heirs at law of a named decedent was insufficient for failing to allege that the persons named were sole heirs at law. *Woodard v. Moss*, 202 Miss. 33, 30 So. 2d 420 (1947).

Bill to quiet title, not alleging derangement of title or claiming adverse possession, held insufficient to support decree pro confesso for complainant and final decree thereon. *Smith v. Deas*, 158 Miss. 111, 130 So. 105 (1930).

An allegation that complainant's ancestor was at the time of his death seized and possessed in fee simple is merely a legal conclusion and a statement of constructive and not of actual possession. *Jones v. Rogers*, 85 Miss. 802, 38 So. 742 (1905), error dismissed, 214 U.S. 196, 529 S. Ct. 635, 3 L. Ed. 965 (1909).

It is not necessary to set out particularly defendant's title, which it is sought to cancel. *Wright v. Lauderdale County Supvrs.*, 71 Miss. 800, 15 So. 116 (1894).

A bill alleging that plaintiff's father, as owner of land, sold it and gave plaintiff the purchase-money notes, that she sued on them and recovered judgment, that the land was sold under execution to her, and that the debtor surrendered possession to her, sets up such an equitable title in plaintiff as entitles her to sue to remove a cloud on the title. *Williamson v. Louisville, N.O. & T. Ry.*, 6 So. 205 (Miss. 1889).

The allegation that complainant is the true and equitable owner by purchase from one whose title is not set out is insufficient. *Harrill v. Robinson*, 61 Miss. 153 (1883).

If the object be to cancel a particular evidence of title possessed by defendant, it

should be as fully described as known to the pleader. *Cook v. Friley*, 61 Miss. 1 (1883).

8. Evidence.

Church, claiming under prior recorded deed which properly described the land therein by metes and bounds although reference to total acreage was erroneous, was entitled to have its title quieted thereto as against defendants claiming under a subsequent conveyance of the remainder of the quarter section from the same grantor, since defendants acquired no semblance or color of title to the church's realty under the latter conveyance, and their plea of adverse possession was not sustained by proof that they claimed some of the land and that each of them pastured a cow thereon for as long as ten consecutive years. *Miles v. Collinsville Methodist Church*, 46 So. 2d 110 (Miss. 1950), error overruled, 46 So. 2d 793 (Miss. 1950).

Deed of purchaser at tax sale for unpaid taxes was not sustained in suit to quiet title where owner introduced into evidence duplicate receipt issued pursuant to *Hemingway's Code*, 1927, § 8241, showing owner paid taxes, and where owner orally testified that he paid the taxes and such testimony was contradicted. *Walker v. Polk*, 208 Miss. 389, 44 So. 2d 477 (1950).

In suit to quiet title, when phrase in restrictive covenant is shown by expert witnesses to be ambiguous, situation justifies resort to further aid of construction, that of negotiations and conversations leading up to adoption of restrictive covenant. *Magnolia Textiles, Inc. v. Gillis*, 206 Miss. 797, 41 So. 2d 6 (1949).

In suit to quiet title to land in which decree involves meaning of restriction in deed against operation on property of textile industry, decree for neither side can rest on testimony of experts in textile trade as to meaning of term "textile industry" when their own disagreement and divergence of understanding of its significance make manifest that phrase is ambiguous and not solvable by uniform trade understanding. *Magnolia Textiles, Inc. v. Gillis*, 206 Miss. 797, 41 So. 2d 6 (1949).

Where grantors of deed remained in possession on the theory that it was in-

tended to be a mortgage, they had the right to show by parol that it was so intended. *McGehee v. Weeks*, 112 Miss. 483, 73 So. 287 (1916).

Where the bill calls for a discovery of defendant's title, an unsworn answer setting up a tax title is not evidence thereof. What effect a sworn answer would have, not decided. *National Bank of Republic v. Louisville, N.O. & T. Ry.*, 72 Miss. 447, 17 So. 7 (1895).

9. Burden of proof.

Former wife is entitled to equitable lien against realty title to which is in former husband where wife satisfies burden of proof with respect to misrepresentation by showing that husband executed deed to wife and caused photocopy of deed to be imprinted with notary seal and taken to home, that wife came into possession of photocopy of deed, that wife helped pay for land, and that wife will suffer detriment if her claim to title is defeated. *Chapman v. Chapman*, 473 So. 2d 467 (Miss. 1985).

Oil company seeking to remove as cloud on leasehold interest lease held by another lessee covering same property has burden of proving that oil well on property in question continued as producing well or that reworking operations were begun within time prescribed by lease, if production ceased, and that production was again achieved and continued keeping leases in force and effect. *Culbertson v. Dixie Oil Co.*, 467 So. 2d 952 (Miss. 1985).

Purchaser at tax sale who seeks to have tax title quieted and confirmed has burden of proving valid assessment of land for taxes and that taxes for which land was offered for sale had not been paid. *Walker v. Polk*, 208 Miss. 389, 44 So. 2d 477 (1950).

In an action by the record owner of land to remove defendant's claim thereto as a cloud upon its title, wherein defendant by cross-bill asserted title to the land by adverse possession, the burden was upon the defendant to show that he was vested with title by adverse possession to the disputed area, and to do so it was necessary for him to show that he alone, or he and his predecessors in title together, had had actual, open, hostile, peaceable, exclusive, continuous possession of the land for ten years, under claim of ownership

thereto. *Southern Naval Stores Co. v. Price*, 202 Miss. 116, 30 So. 2d 505 (1947), error overruled, 202 Miss. 124, 32 So. 2d 575 (1947).

Complainant in bill to remove clouds and establish title to land has burden of showing perfect title in himself. *Nicholson v. Myres*, 170 Miss. 441, 154 So. 282 (1934).

10. Relief granted.

Former wife is entitled to equitable lien against realty title to which is in former husband where wife satisfies burden of proof with respect to misrepresentation by showing that husband executed deed to wife and caused photocopy of deed to be imprinted with notary seal and taken to home, that wife came into possession of photocopy of deed, that wife helped pay for land, and that wife will suffer detriment if her claim to title is defeated. *Chapman v. Chapman*, 473 So. 2d 467 (Miss. 1985).

In suit to cancel tax title, affirmative relief declaring tax title to be valid could not be granted in absence of cross-bill. *Webb v. Anderson*, 206 Miss. 398, 40 So. 2d 189 (1949).

Entry of possession by defendants under tax patent from state, with actual knowledge of former owner and continuance in possession for more than two years, with payment of taxes, established adverse possession against former owner, barring suit to cancel the tax sale to the state and patent from the state as clouds upon plaintiffs' title. *Webb v. Anderson*, 206 Miss. 398, 40 So. 2d 189 (1949).

Purchase of property at tax sale, which property was assessed according to a plat prepared by the owners showing abutting alleys and paths needed for access thereto but otherwise of no appreciable value, carried with it full and unrestricted right of ingress and egress over such approaches. *Evans v. City of Jackson*, 201 Miss. 14, 28 So. 2d 249 (1946).

Husband who has instituted suit against former wife to cancel her claim to property as a cloud upon his title is not entitled to relief where he has not offered to do full equity toward the wife. *Peeler v. Peeler*, 199 Miss. 492, 24 So. 2d 338 (1946), cert. denied, 329 U.S. 720, 67 S. Ct. 54, 91 L. Ed. 624 (1946), reh'g denied,

329 U.S. 829, 67 S. Ct. 295, 91 L. Ed. 703 (1946).

Deed in consideration for support of grantor not cancelled for failure to support, where it contains no provision for forfeiture and reserves no lien to secure performance. *Wynn v. Kendall*, 122 Miss. 809, 85 So. 85 (1920).

Deed in fee simple to defendant, purchasing under foreclosure of trust deed on life estate, should be cancelled after death of life tenant as a cloud on title of remaindermen. *Leflore v. Flowers*, 117 Miss. 682, 78 So. 513 (1918), on suggestion of error, 118 Miss. 75, 79 So. 60 (1918).

11. Judgment or decree.

In suit to quiet title, decree of chancellor that covenant in deed prohibiting use of property for any type of textile industry did not prohibit use of described property as place to manufacture garments or other similar articles of wearing apparel, given on conflicting evidence equally balanced, or nearly so, will be affirmed on appeal to Supreme Court. *Magnolia Textiles, Inc. v. Gillis*, 206 Miss. 797, 41 So. 2d 6 (1949).

Any judgment adjudging plaintiff in an action under this section [Code 1942, § 1324] to be the owner of the land as against one claiming by adverse possession thereto is not binding as against the claim of a third person not made a party to the suit who might have acquired a good and perfect title against plaintiff by ten years adverse possession under § 711, Code 1942. *Southern Naval Stores Co. v. Price*, 202 Miss. 116, 30 So. 2d 505 (1947), error overruled, 202 Miss. 124, 32 So. 2d 575 (1947).

In a suit to hold invalid and set aside a tax sale to the state and a patent from the state to a municipality, the chancellor was correct in decreeing that the patent to the municipality vested in it all right, title and interest of the owner of record and his predecessors in title, where the evidence supported chancellor's finding that the land was not being used exclusively for burial purposes when assessed and sold for taxes and that it was subject to assessment and sale therefor. *Evans v. City of Jackson*, 201 Miss. 14, 28 So. 2d 249 (1946).

False allegation that there is no adverse possession is a fraud on the court and decree confirming title is void as to a defendant in adverse possession where complainant does not proceed under this section (Code 1906, § 550) to have such adverse claim cancelled. *Brooks-Scanlon Co. v. Stogner*, 114 Miss. 736, 75 So. 596 (1917).

Suit to cancel decree confirming title for fraud is not a collateral attack. *Brooks-Scanlon Co. v. Stogner*, 114 Miss. 736, 75 So. 596 (1917).

12. Injunction in aid of remedy.

Equity will enjoin a sale of real estate under legal process, where the only effect of the sale would be to cast a cloud upon complainant's title. *Irwin v. Lewis*, 50 Miss. 363 (1874).

13. Res adjudicata.

Complainant's title having been put in issue, a decree dismissing his bill, though for defect of proof, bars a subsequent suit. *Chiles v. Champenois*, 69 Miss. 603, 13 So. 840 (1891).

RESEARCH REFERENCES

ALR. Decree or judgment subject to direct attack in chain of title as rendering title unmerchantable. 9 A.L.R.2d 710.

Necessary or proper parties to suit or proceeding to establish private boundary line. 73 A.L.R.3d 948.

Am Jur. 65 Am. Jur. 2d, Quieting Title and Determination of Adverse Claims §§ 1 et seq.

20A Am. Jur. Pl & Pr Forms (Rev), Quieting Title and Determination of Ad-

verse Claims, Form 25.1 (Complaint, petition, or declaration-To remove cloud on title-To enjoin construction of edifice until boundary dispute determined).

20 Am. Jur. Pl & Pr Forms (Rev), Quieting Title and Determination of Adverse Claims, Forms 1-115 (Proceedings to quiet title and to determine adverse claims to property).

CJS. 74 C.J.S., Quieting Title §§ 1-114.

§ 11-17-33. Receiver appointed for nonresident or unknown owners of mineral interests.

(1) To encourage the exploration and development of the state's mineral resources, upon application, accompanied by sworn affidavit, of one or more persons, firms or corporations claiming or owning any mineral interest in a tract of land and upon which mineral production is desired, the chancery court of the county in which the land, or any part thereof, is located shall have the authority to appoint the chancery clerk as receiver of any mineral interest claimed or owned by any person, or persons, whose whereabouts or identity is unknown, if the court is satisfied after hearing and proof that the said person, or persons, could not be found after diligent search and inquiry and that petitioners will suffer loss, damage or injury unless such receiver is appointed.

(2) Such receiver shall have power and authority, under court order, to execute and deliver to a lessee, determined by the court, a mineral lease on any such outstanding mineral interest, upon such terms and conditions as may be prescribed by the court; provided, however, that the court affirmatively find that the lease taken as a whole shall be at least as favorable to the absent person as other leases in the same tract of land and shall be in the best interest of all parties. It shall be conclusively presumed in every court in this state that the terms and conditions of said lease are reasonable, fair and represent the fair market value of the interests leased. The moneys, if any, paid to such receiver for execution, delay rentals, royalties or any other proceeds of such

lease shall be paid immediately upon accrual to the receiver and shall be impounded by said receiver for the use and benefit of such person. The receiver shall hold, preserve and invest any such money so received in the same manner as other moneys held by the chancery clerk and on order of the court shall pay any money so held, with any interest accrued less costs of the receivership, to any person holding a valid claim thereto when said claim is asserted within ten (10) years of the date of the decree establishing the receivership. The official bond of the chancery clerk shall cover any money paid him as such receiver and the chancellor may prescribe such additional bond as he may think proper.

(3) No receiver shall be appointed under the provisions of this section unless all interested parties who are not parties to the petition shall be made defendants and all such defendants shall have been served with process of the court provided by law for cases in chancery court. The summons by publication shall be substantially in the following form:

"THE STATE OF MISSISSIPPI

_____ (inserting names of defendants)

You are summoned to appear before the Chancery Court of the County of _____ in said state, on the _____ Monday of _____, A.D. _____, to defend the suit of _____ (et al.) praying the appointment of a receiver of an undivided mineral interest claimed to be owned by you in and under _____ (here describe the land) wherein you are a defendant. This the _____ day of _____, A.D.

Clerk"

(4) The costs of the action for appointment of the receiver shall be taxed against the petitioners if they fail to prove their case.

(5) The receivership, once established, shall continue, unless dissolved by the court for good cause, for a period of at least ten (10) years.

(6) This section shall not alter or change any laws now in effect relating to suits for the removal of clouds upon title or the appointment of receivers under any other law, but is cumulative thereof.

(7) The term "tract of land" as used herein shall not be limited to property wherein petitioner owns an undivided interest; but may include any geographic boundary upon which mineral exploration and/or production may be conducted even though the tract may include property in which petitioner has no property interest or any other geographic boundary the court, in its discretion, may deem appropriate.

SOURCES: Codes, 1942, § 1324.5; Laws, 1950, ch. 340, §§ 1-5; Laws, 1980, ch. 412, § 1, eff from and after July 1, 1980.

Cross References — Appointment or removal of receivers in vacation, see § 11-5-151.

Receivers, generally, see §§ 11-5-153 et seq.

Disposition of proceeds held by receiver, see § 11-17-34.

Procedural rules applicable to civil actions, see Miss. R. Civ. P. 1 et seq.

Applicability of Mississippi Rules of Civil Procedure to proceedings brought under this section, see Miss. R. Civ. P. 81.

RESEARCH REFERENCES

- Am Jur.** 1 Am. Jur. 2d, Absentees §§ 1-18.
 65 Am. Jur. 2d, Receivers § 10.
 21 Am. Jur. Pl & Pr Forms (Rev), Receivers, Form 81 (Order appointing receiver on motion of party).
CJS. 75 C.J.S., Receivers §§ 10-14.

§ 11-17-34. Disposition of mineral lease proceeds held by receiver.

Unless otherwise released by the court, the receiver appointed in Section 11-17-33 shall hold all net proceeds paid in connection with such lease for a period of ten (10) years from the date of the decree establishing the receivership. If, at the end of that period of ten (10) years, no valid claim has been made for such moneys and said mineral interests, all moneys and mineral interests held by the receiver shall immediately escheat to the state in the same manner as if the absent person had died intestate leaving no heirs capable of inheriting as set forth in Chapter 11, Title 89, Mississippi Code of 1972. Provided, however, any person who is not concluded as a party or privy by a decree in favor of the state in proceedings to establish an escheat, may recover of the state, by suit, the net proceeds derived from any lease and from the sale of such minerals and paid into the state treasury, if the party shall establish his right to such minerals and that the same had not properly escheated to the state; but the title of the purchaser of such minerals shall not be thereby disturbed.

SOURCES: Laws, 1980, ch. 412, § 2, eff from and after July 1, 1980.

Cross References — When property escheats to state, see § 89-11-1.
 Proceedings to establish escheats, see §§ 89-11-5 et seq.
 Procedural rules applicable to civil actions, see Miss. R. Civ. P. 1 et seq.

RESEARCH REFERENCES

- ALR.** Uniform Disposition of Unclaimed Property Act. 98 A.L.R.2d 304.
Am Jur. 1 Am. Jur. 2d, Abandoned, Lost and Unclaimed Property §§ 1-41 et seq.
 27 Am. Jur. 2d, Escheat §§ 1-12, 30 et seq.
 9 Am. Jur. Pl & Pr Forms (Rev) Escheat, Forms 1 et seq. (Proceedings to enforce escheat).
 9 Am. Jur. Pl & Pr Forms (Rev), Escheat, Forms 21 et seq. (Recovery, restoration or reimbursement).
CJS. 30A C.J.S., Escheat §§ 1 et seq.

§ 11-17-35. Title of complainant must be deraigned—and decrees, in certain cases, recorded as deeds.

In bills to confirm title to real estate, and to cancel and remove clouds therefrom, the complainant must set forth in plain and concise language the deraignment of his title. If title has passed out of the sovereign more than seventy-five (75) years prior to the filing of the bill, then the deraignment shall be sufficient if it show title out of the sovereign and a deraignment of title for not less than sixty (60) years prior to the filing of the bill. A mere statement

therein that complainant is the real owner of the land shall be insufficient, unless good and valid reason be given why he does not deraign his title. In all such cases, final decrees in the complainant's favor shall be recorded in the record of deeds, and shall be indexed as if a conveyance of the land from the defendant or each of them, if more than one, to the complainant or complainants, if more than one.

SOURCES: Codes, 1892, § 501; Laws, 1906, § 551; Hemingway's 1917, § 308; Laws, 1930, § 405; Laws, 1942, § 1325; Laws, 1962, ch. 285.

Cross References — Requirement of recordable conveyance of land, see §§ 89-3-1 et seq.

Procedural rules applicable to civil actions, see Miss. R. Civ. P. 1 et seq.

JUDICIAL DECISIONS

1. Jurisdiction.
2. Necessity of deraigning title.
3. Sufficiency of showing.
4. Presumptions and burden of proof.
5. Decree.

1. Jurisdiction.

The Chancellor's decision enforcing settlement between landowners was affirmed because defendant granted her attorney actual authority to settle lawsuit and she did not terminate attorney-client relationship until after the settlement. *Fortenberry v. Parker*, 754 So. 2d 561 (Miss. Ct. App. 2000).

Jurisdiction respecting conclusive adjudication of land titles rests alone with circuit and chancery courts, and to limited extent with county courts. *Vansant v. Dodds*, 164 Miss. 787, 144 So. 688 (1932), error overruled, 164 Miss. 799, 145 So. 613 (1933).

2. Necessity of deraigning title.

In an action to remove cloud on title, a plaintiff has the burden of showing perfect title and cannot rely on the weaknesses of a defendant's title. *Williams v. King*, 860 So. 2d 847 (Miss. Ct. App. 2003).

Although the Supreme Court would not reverse a decree confirming title to a slip or canal in the complainant merely because the complainant did not deraign title to himself as required by this section [Code 1942, § 1325] or give a good and valid reason why he did not do so, since the proof showed that title came from a common source, reversal was required where complainant failed to deraign title

from the common source to the necessary parties to the suit, and his bill did not allege that he had joined in the suit all parties interested in the land so far as known to him and could be ascertained by diligent inquiry, and where one of the owners of one of the tracts purchased from the common source involved in the action had not been made a party thereto. *Warren v. Clark*, 230 Miss. 873, 94 So. 2d 323 (1957).

In a suit to remove clouds on his title, where the complainant relies upon adverse possession for his title, it is not necessary to deraign record title to land. *Cochran v. Cochran*, 221 Miss. 780, 74 So. 2d 841 (1954).

Deraignment of title is required only in bills to conform title to real estate and to cancel and remove clouds therefrom, and where a bill is brought to cancel a deed the demurrer was overruled. *Martin v. Adams*, 216 Miss. 270, 62 So. 2d 328 (1953).

Requirement that bill for cancellation of title set out deraignment of title is made mandatory by this section [Code 1942, § 1325]. *Smith v. Overstreet*, 205 Miss. 488, 38 So. 2d 923 (1949).

Bill for cancellation of title must meet requirements of this section [Code 1942, § 1325] by setting out deraignment of title, and it does not state case against defendants unless deraignment is sufficient, since complainant must depend upon strength of his own title and not weakness of that of his adversary. *Smith v. Overstreet*, 205 Miss. 488, 38 So. 2d 923 (1949).

Chancellor is correct in sustaining special demurrer to bill for cancellation of title for failure to deraign title and, upon complainants' refusal to amend, in dismissing bill, when the bill contains no deraignment or good and valid reason given for its absence, in accordance with this section [Code 1942, § 1325]. *Smith v. Overstreet*, 205 Miss. 488, 38 So. 2d 923 (1949).

Complainant must deraign title or give reason for not doing so. *Longmire v. Mars*, 124 Miss. 77, 86 So. 753 (1921).

Remaindermen cannot bring suit to cancel foreclosure sale under deed of trust of a life estate prior to the death of the original life tenants. *Leflore v. Flowers*, 118 Miss. 75, 79 So. 60 (1918).

In suit to confirm title or remove clouds complainant must deraign title. *Russell v. Town of Hickory*, 116 Miss. 46, 76 So. 825 (1917).

Plaintiff in suit to confirm title must plead and prove perfect title in himself. *Gilchrist-Fordney Co. v. Keyes*, 113 Miss. 742, 74 So. 619 (1917).

Complainant seeking to cancel contracts for sale of timber land must deraign title in himself. *Eastman v. Wyatt Lumber Co.*, 102 Miss. 313, 59 So. 93 (1912).

Complainants seeking to redeem land from tax sale to their ancestors need not prove title in her, she being the common source of title of the parties. *Westerfield v. Merchant*, 93 Miss. 791, 47 So. 434 (1908).

Complainant must show either (a) Title in himself from the government down, or (b) Title in himself by adverse possession, or (c) Title in himself from the defendant, or (d) That the parties to the suit claim under a common source, the complainant having the better title from that source. *Long v. Stanley*, 79 Miss. 298, 30 So. 823 (1901); *Smith v. Overstreet*, 205 Miss. 488, 38 So. 2d 923 (1949).

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He must show as perfect a title, legal or equitable, as would enable him, the title being a legal one, to recover against the defendant in an action of ejectment. *Chiles v. Gallagher*, 67 Miss. 413, 7 So. 208 (1889).

3. Sufficiency of showing.

In an action to confirm title to a parcel of land in the city of Biloxi, the trial court erred in not confirming title in the city where, in a prior eminent domain proceeding, the judgment revealed an adequate description by monuments of the entire parcel in question although there was a discrepancy in the distances set forth in the judgment. *Biloxi Dev. Comm'n v. Frey*, 401 So. 2d 716 (Miss. 1981).

A bill of complaint in a proceeding requiring deraignment of title does not state a case against defendants thereto unless the deraignment be sufficient, since complainant must depend upon the strength of his own title and not the weakness of that of his adversary. *Dorsey v. Sullivan*, 199 Miss. 602, 24 So. 2d 852 (1946).

Bill for confirmation of title which merely stated that the land was derived from a common source who "owned" the land was not sufficient in a deraignment, and the bill was demurrable for failure to show facts of the common source's title. *Dorsey v. Sullivan*, 199 Miss. 602, 24 So. 2d 852 (1946).

Either plaintiff or interveners, claiming title to plaintiff's undivided interest in oil land by reason of quitclaim deed from plaintiff, subject to plaintiff's right to receive payment for oil produced from the land, were proper parties to maintain action to confirm title to such land and to set aside colessor's agreement executed by plaintiff. *White v. Union Producing Co.*, 140 F.2d 176 (5th Cir. 1944).

In suit to confirm tax title, bill alleging that title passed from Government by recorded patent to person against whom lands were assessed for taxes and that land was sold for unpaid taxes and tax deed was issued, filed, and acknowledged held sufficient to show deraignment of title. *Salter v. Polk*, 172 Miss. 263, 159 So. 855 (1935).

In suit to confirm title or remove clouds general averment that complainant is real

owner not sufficient. *Russell v. Town of Hickory*, 116 Miss. 46, 76 So. 825 (1917).

Bill to quiet title is demurrable if it fails to show facts as to validity of defendant's title, or the interest of any of the parties in the land, or when decedent died or how any of the parties is heir to him. *Thames v. Duvic*, 89 Miss. 9, 42 So. 667 (1907).

A mere statement in a bill that complainant is the real owner of the land is insufficient unless good and valid reason be given for the failure to deraign his title. *Jackson v. Port Gibson Bank*, 85 Miss. 645, 38 So. 35 (1905).

4. Presumptions and burden of proof.

The presumption that land has been granted to the possessor by the state arises where there is some unexplained anomaly in the chain of title; however, this principle should not be construed to mean that the presumption arises only in the face of such an anomaly. The open and continuous possession of property by the claimants and their predecessors in title from 1892 to the present, together with the usual acts incident to ownership, were sufficient to raise the presumption of a

grant. *Board of Trustees v. Rye*, 521 So. 2d 900 (Miss. 1988).

Complainant has burden of showing perfect title in himself to maintain bill to remove clouds and establish his title to land. *Nicholson v. Myres*, 170 Miss. 441, 154 So. 282 (1934).

In suit to confirm title where complainant proves possession for fifty years and a perfect chain of title back to an uncle of the original patentee, presumption arises of a lost deed from patentee to uncle. *Scarborough v. Native Lumber Co.*, 118 Miss. 138, 79 So. 84 (1918).

5. Decree.

Bill to quiet title, not alleging deraignment of title or claiming adverse possession, held insufficient to support decree pro confesso for complainant and final decree thereon. *Smith v. Deas*, 158 Miss. 111, 130 So. 105 (1930).

In suit to confirm tax sale, if complainant fails to show title in himself from the government down, decree pro confesso not authorized; unauthorized decree pro confesso may be set aside. *Lyon Co. v. Ratliff*, 129 Miss. 342, 92 So. 229 (1922).

RESEARCH REFERENCES

Am Jur. 65 Am. Jur. 2d, Quieting Title and Determination of Adverse Claims §§ 37, 61.

CJS. 74 C.J.S., Quieting Title §§ 23-34, 63, 86, 87.

§ 11-17-37. Decrees as to possession, rents, etc.

In suits to try title, to cancel deeds and other clouds upon title, and to confirm title to real estate, the chancery court shall have jurisdiction to decree possession and to displace possession, to decree rents and compensation for improvements and taxes. In all cases where said courts heretofore exercised jurisdiction auxiliary to courts of common law, it may exercise such jurisdiction to grant the relief sought, although the legal remedy may not have been exhausted or the legal title established by a suit at law.

SOURCES: Codes, 1892, § 502; Laws, 1906, § 552; Hemingway's 1917, § 309; Laws, 1930, § 406; Laws, 1942, § 1326.

Cross References — Constitutional jurisdiction to decree possession and rents of real estate, see Miss. Const. Art. 6, § 160.

Procedure for attachment or distress for rent, see §§ 89-7-55 et seq.

Procedural rules applicable to civil actions, see Miss. R. Civ. P. 1 et seq.

JUDICIAL DECISIONS

1. In general.

In an action for cancellation of an instrument conveying real estate, the fact that the affected land was in another state may make the law of that state controlling but did not, of itself, defeat the subject matter jurisdiction of the Mississippi courts. *Anderson v. Sonat Exploration Co.*, 523 So. 2d 1024 (Miss. 1988).

Chancery Court has jurisdiction to hear and adjudicate controversy involving validity and effect of power of attorney, which has not been acknowledged and recorded in manner of conveyance of land, with respect to conveyance of real property situated in Republic of Greece where all parties reside in Mississippi and have been effectively subjected to in personam jurisdiction of Chancery Court; court may enter personal judgment, even though controlling substantive law is that of Greece; final adjudication would effectively bind parties in Mississippi and presumably in all other states even though adjudication may not be enforceable in Greece as matter of right and maybe not even as matter of comity. *Kountouris v. Varvaris*, 476 So. 2d 599 (Miss. 1985).

Where plaintiff in ejectment suit made the same allegations as those made in a prior suit for confirmation of title, except the allegation as to confirmation of title, decision in confirmation suit sustaining general demurrer for failure of complainant to show title in himself was *res judicata* in ejectment suit. *Williams v. Patterson*, 203 Miss. 865, 34 So. 2d 366 (1948).

Decree of chancery court confirming title and possession of mortgagee to realty which mortgagee bought upon foreclosure of trust deed held not *res judicata* of action of unlawful entry and detainer instituted by mortgagee, where rents and compensation for improvements were sought in such action but were not sought in chancery proceeding. *Lion Oil Ref. Co. v. Crystal Oil Co.*, 171 Miss. 36, 156 So. 593 (1934).

Where specific performance was denied purchaser who defaulted, court properly awarded purchaser sum for permanent and valuable improvements made in good faith. *Swalm v. Gill*, 151 Miss. 630, 118 So. 446 (1928).

RESEARCH REFERENCES

Am Jur. 65 Am. Jur. 2d, Quieting Title and Determination of Adverse Claims § 61.

20 Am. Jur. Pl & Pr Forms (Rev), Quieting Title and Determination of Adverse Claims, Form 13 (Judgment or decree quieting title and ordering issuance of writ of possession).

20A Am. Jur. Pl & Pr Forms (Rev), Quieting Title and Determination of Adverse Claims, Form 25.1 (Complaint, petition, or declaration—To remove cloud on title—To enjoin construction of edifice until boundary dispute determined).

CJS. 74 C.J.S., Quieting Title §§ 63, 86.

CHAPTER 19

Ejectment

SEC.

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- 11-19-3. Power of courts over proceedings.
- 11-19-5. Who may be made defendants.
- 11-19-7. Repealed.
- 11-19-9. Landlord notified and admitted to defend.
- 11-19-11. Reversioner or remainderman admitted to defend.
- 11-19-13. Default of tenant for life not to prejudice.
- 11-19-15. Declaration.
- 11-19-17. Repealed.
- 11-19-19. Answer and defense.
- 11-19-21. Pleading amended as to description of premises.
- 11-19-23. Forms of proceedings.
- 11-19-25. Form of declaration.
- 11-19-27 through 11-19-51. Repealed.
- 11-19-53. Right to discover details of claim or title to premises.
- 11-19-55. Either party may have a survey made.
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- 11-19-85. Trial of action between cotenants.
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- 11-19-89. Proceedings as to crop upon affirmance of judgment in Supreme Court.
- 11-19-91. Judgment on the bond in proceedings involving crop.
- 11-19-93. Exceptions to insufficient bond.
- 11-19-95. Mesne profits and compensation for improvements.
- 11-19-97. How improvements estimated and judgment therefor.
- 11-19-99. How proceeds divided in case of sale.
- 11-19-101. Reversioner or remainderman to have appeal.
- 11-19-103. Judgment as res adjudicata.
- 11-19-105. Record may be recorded as a deed.

§ 11-19-1. In what case the action lies.

A civil action seeking ejectment as relief may be maintained in all cases where the plaintiff is legally entitled to the possession of the land sued for and demanded.

SOURCES: Codes, 1892, § 1626; Laws, 1906, § 1801; Hemingway's 1917, § 1434; Laws, 1930, § 1427; Laws, 1942, § 778; Laws, 1991, ch. 573, § 36, eff from and after July 1, 1991.

Cross References — Actions for unlawful entry and detainer, see §§ 11-25-1 et seq. Limitation of actions to recover land, see § 15-1-7.

Action by board of supervisors to recover sixteenth sections or lieu lands, see § 29-3-85.

Action against tenant holding over, see §§ 89-7-27 et seq.

Seizure of person or property, see Miss. R. Civ. P. 64.

JUDICIAL DECISIONS

1. Generally.
2. Equitable defenses.
3. Actions against railroads.

1. Generally.

Plaintiff, who introduced a certificate from the United States land office showing that he had entered lands involved, and also certificates showing cancellation and surrender of prior entry under which defendants claimed, could maintain ejectment. *Gilleylen v. Isbel*, 119 Miss. 566, 81 So. 161 (1919).

Where plaintiffs claimed as heirs and defendants claimed under a sale by the administrator of plaintiffs' ancestor, it was error not to adjudge plaintiffs entitled to the homestead, especially excepted from the sale through which defendants claimed. *Shannon v. Summers*, 50 So. 693 (Miss. 1909).

Possession of land for ten years gives the possessor and those claiming under him a sufficient title to recover in ejectment against a mere intruder who has no title. *Anderson v. Moore*, 84 Miss. 400, 36 So. 520 (1904).

The owner of the legal title to a strip of land may maintain ejectment therefor against defendant's exercising exclusive possession thereof, although the latter have a right of way over the same. *Lott v. Payne*, 82 Miss. 218, 33 So. 948, 100 Am. St. R. 632 (1903).

A deed to a strip of land limiting the grantee's interest to "a private easement or for street purpose only," does not authorize the grantee to take exclusive possession of the land. *Lott v. Payne*, 82 Miss. 218, 33 So. 948, 100 Am. St. R. 632 (1903).

A plaintiff in ejectment who shows a perfect legal title in herself is entitled to recover, although she may have described herself in the declaration as administratrix of the estate and guardian of the heirs of the decedent. *Richardson v. Biglane*, 81 Miss. 676, 33 So. 650 (1903).

The vendee in a deed from a husband living with his wife, which she did not sign, purporting to convey his homestead, cannot maintain ejectment for the lands after the death of the husband against those who claim under his heirs. *Johnson v. Hunt*, 79 Miss. 639, 31 So. 205 (1902).

Ejectment does not lie for land taken for levee purposes by the board of levee commissioners for the Yazoo-Mississippi Delta, even when compensation has not preceded the taking. *Owens v. Yazoo-Mississippi Delta Levee Bd.*, 74 Miss. 269, 21 So. 12 (1896).

2. Equitable defenses.

Where a plaintiff in ejectment suit made the same allegations as to right of possession as those made in prior suit for confirmation of title, which was adjudicated against him for failure to show title in himself, decision in confirmation suit was *res judicata* in ejectment suit. *Williams v. Patterson*, 203 Miss. 865, 34 So. 2d 366 (1948).

This section [Code 1942, § 778] does not preclude an equitable defense to an action in ejectment; consequently, a lease, if conceded to be void as a lease, could operate as a valid contract to lease as a defense to an ejectment. *Hytken v. Bianca*, 186 Miss. 323, 186 So. 624 (1939), error overruled, 186 Miss. 343, 188 So. 311 (1939).

Where defendant disclaims as to part of land, failure to adjudge it to plaintiff is not error, in the absence of a request. *Buie v. Cloy*, 127 Miss. 719, 90 So. 446 (1921).

A decree dismissing a bill to redeem an undivided interest in land from a tax sale, and for partition after redemption, does not estop the complainant from setting up the invalidity of the tax sale when sued in ejectment for the same land. *Brothers v. Beck*, 75 Miss. 482, 22 So. 944 (1898).

Holding that in ejectment equitable defenses are inadmissible; hence it is not permissible for the defendant to show that, because of the circumstances under which the purchaser bought at tax sale, he was a trustee of the legal title for defendant and disqualified to purchase and hold against him. *Morgan v. Blewett*, 72 Miss. 903, 17 So. 601 (1895).

3. Actions against railroads.

Ejectment will lie against a railroad company to recover land upon which it has wrongfully entered and constructed its track, but where the defendant acted in good faith the recovery will be limited to the land itself, with compensation for any

use to which the premises might reasonably have been put by him and a sum to cover all damages done by the defendant. Illinois Cent. R.R. v. Hoskins, 80 Miss. 730, 32 So. 150, 92 Am. St. R. 612 (1902).

A railroad track wrongfully constructed on land does not become a part of the freehold and upon ejection the railroad company has the right to remove the track, and this right applies as well to a short spur track as to a trunk line. Illinois

Cent. R.R. v. Hoskins, 80 Miss. 730, 32 So. 150, 92 Am. St. R. 612 (1902).

While ejectionment can be maintained against a railroad company for the possession of its right of way, execution of such judgment should be stayed for reasonable time to enable the company to institute and prosecute a condemnation proceeding to acquire a right of way. Illinois Cent. R.R. v. Le Blanc, 74 Miss. 650, 21 So. 760 (1897).

RESEARCH REFERENCES

ALR. Remedy of tenant against stranger wrongfully interfering with his possession. 12 A.L.R.2d 1192.

Common source of title doctrine. 5 A.L.R.3d 375.

Validity, construction, and application of mobile home eviction statutes. 43 A.L.R.5th 705.

When is eviction of tenant by private landlord conducted "under color of state law" for purposes of 42 USCS § 1983. 73 A.L.R. Fed. 78.

Am Jur. 25 Am. Jur. 2d, Ejectment §§ 1-2, 6 et seq.

CJS. 28 C.J.S., Ejectment §§ 2 et seq.

§ 11-19-3. Power of courts over proceedings.

The court in which an action of ejectment may be brought or be pending may exercise over the proceedings therein the like jurisdiction and control as heretofore exercised in the action of ejectment, so as to insure a trial of the title only, and of actual ouster when necessary, and for all other purposes for which such jurisdiction was heretofore exercised.

SOURCES: Codes, 1857, ch. 55, art. 33; 1871, § 1570; 1880, § 2514; 1892, § 1627; Laws, 1906, § 1802; Hemingway's 1917, § 1435; Laws, 1930, § 1428; Laws, 1942, § 779.

Cross References — Seizure of person or property, see Miss. R. Civ. P. 64.

JUDICIAL DECISIONS

1. In general.

Chancery Court is proper forum to hear ejectment proceeding in which sole defense is equitable defense of "fraudulent means." Hudson v. Bank of Edwards, 469 So. 2d 1234 (Miss. 1985).

An owner, not made a party to and not having notice of an action in ejectment against a tenant of a tenant, is not affected by the judgment. Melsheimer v. McKnight, 92 Miss. 386, 46 So. 827 (1908).

A court of equity will enforce, and is the

proper forum in which to assert, the rights of one who owns a house situated on the land of another. Decell v. McRee, 83 Miss. 423, 35 So. 940 (1904).

In such case a judgment by default in an ejectment suit brought for the land by its owner against the owner of the house is not res adjudicata of the right of the defendant to remove the house, since the house is personal property. Decell v. McRee, 83 Miss. 423, 35 So. 940 (1904).

§ 11-19-5. Who may be made defendants.

If the premises for which the action is brought be actually occupied by any person, such actual occupant shall be made a defendant in the suit; and all other persons claiming title or interest to or in the same may also, in all cases, be joined as defendants. If the premises be not occupied, the action shall be brought against some person exercising acts of ownership over the premises claimed, or claiming title thereto or some interest therein at the commencement of the suit.

SOURCES: Codes, 1892, § 1628; Laws, 1906, § 1803; Hemingway's 1917, § 1436; Laws, 1930, § 1429; Laws, 1942, § 780.

Cross References — Procedural rules applicable to civil actions, see Miss. R. Civ. P. 1 et seq.

Seizure of person or property, see Miss. R. Civ. P. 64.

RESEARCH REFERENCES

Am Jur. 25 Am. Jur. 2d, Ejectment **CJS.** 28 C.J.S., Ejectment §§ 51, 52.
§ 27.

§ 11-19-7. Repealed.

Repealed by Laws, 1991, ch. 573, § 141, eff from and after July 1, 1991.

[Codes, 1892, § 1629; 1906, § 1804; Hemingway's 1917, § 1437; 1930, § 1430; 1942, § 781]

Editor's Note — Former § 11-19-7 pertained to publication of the summons for a nonresident defendant.

§ 11-19-9. Landlord notified and admitted to defend.

Every tenant sued in a civil action seeking ejectment as relief shall forthwith give notice thereof to his landlord, under penalty of three (3) years' rent of the premises, to be recovered by the landlord or his representatives in a civil action. The landlord of such tenant, or any other proper person, shall, by leave of the court or judge, be admitted to appear and defend the action in all cases where the same would have been allowed heretofore, and either separately or jointly with the tenant. Any person admitted to defend as landlord in respect of property whereof he is in possession only by his tenant, shall state in his answer that he defends as such landlord, and such person shall be allowed to set up any defense he has heretofore been allowed to set up, and no other. Any judgment in such action shall have the same effect for or against such person so admitted to defend as if he had been named in the complaint and regularly served with process.

SOURCES: Codes, Hutchinson's 1848, ch. 59, art. 1 (85, 86); 1857, ch. 55, art. 4; 1871, § 1542; 1880, § 2482; 1892, § 1630; Laws, 1906, § 1805; Hemingway's 1917, § 1438; Laws, 1930, § 1431; Laws, 1942, § 782; Laws, 1991, ch. 573, § 37, eff from and after July 1, 1991.

Cross References — Relations between landlord and tenant, generally, see §§ 89-7-1 et seq.

Procedural rules applicable to civil actions, see Miss. R. Civ. P. 1 et seq.

Seizure of person or property, see Miss. R. Civ. P. 64.

RESEARCH REFERENCES

<p>Am Jur. 25 Am. Jur. 2d, Ejectment § 71. 9 Am. Jur. P & P Forms (Rev), Eject-</p>	<p>ment, Forms 82 et seq. (Substituting landlord for tenant as defendant). CJS. 28 C.J.S., Ejectment § 53.</p>
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§ 11-19-11. Reversioner or remainderman admitted to defend.

If a tenant for life or lives be impleaded concerning the land holden, the person to whom the reversion or remainder belongs may come into court at any time before judgment, and shall be admitted to defend his right.

SOURCES: Codes, 1880, § 2516; 1892, § 1631; Laws, 1906, § 1806; Hemingway's 1917, § 1439; Laws, 1930, § 1432; Laws, 1942, § 783.

Cross References — Procedural rules applicable to civil actions, see Miss. R. Civ. P. 1 et seq.

Seizure of person or property, see Miss. R. Civ. P. 64.

§ 11-19-13. Default of tenant for life not to prejudice.

If a tenant for life or lives, when impleaded, make default or give up the tenement demanded, or if the judgment be given on such default or surrender, the person to whom the reversion or remainder belongs after the determination of the life estate, shall not be prejudiced or injured by such default, surrender, or judgment.

SOURCES: Codes, 1880, § 2517; 1892, § 1632; Laws, 1906, § 1807; Hemingway's 1917, § 1440; Laws, 1930, § 1433; Laws, 1942, § 784.

Cross References — Seizure of person or property, see Miss. R. Civ. P. 64.

§ 11-19-15. Declaration.

The consent rule, and all fictions heretofore used in a civil action seeking ejectment as relief, are abolished; and the action shall be commenced by filing a complaint in the name of the person claiming the premises in question, as plaintiff against the defendant. The complaint shall describe the premises with such certainty as will distinctly apprise the defendant of their description and situation, and so that from such description possession may be delivered. If the plaintiff claim only an undivided interest therein, it shall state such interest. If the plaintiff claim more than he is entitled to, he may, nevertheless, recover so much as he shall prove title to.

SOURCES: Codes, 1857, ch. 55, art. 1; 1871, § 1539; 1880, § 2479; 1892, § 1633; Laws, 1906, § 1808; Hemingway's 1917, § 1441; Laws, 1930, § 1434; Laws, 1942, § 785; Laws, 1991, ch. 573, § 38, eff from and after July 1, 1991.

Cross References — Procedural rules applicable to civil actions, see Miss. R. Civ. P. 1 et seq.

Seizure of person or property, see Miss. R. Civ. P. 64.

JUDICIAL DECISIONS

1. In general.

If the declaration describe the land by numbers and the deeds offered in evidence describe it by metes and bounds, it is no

objection, if the proof show it to be the same land. *Lum v. Reed*, 53 Miss. 73 (1876).

RESEARCH REFERENCES

Am Jur. 25 Am. Jur. 2d, Ejectment §§ 32 et seq.

9 Am. Jur. Pl & Pr Forms (Rev), Ejectment, Forms 1 et seq. (Complaint, petition or declaration).

16 Am. Jur. Pl & Pr Forms (Rev), Land-

lord and Tenant, Form 84.1 (Stipulation of agreement — Tenant's consent to issuance and execution of warrant of eviction).

CJS. 28 C.J.S., Ejectment §§ 55, 59 et seq.

§ 11-19-17. Repealed.

Repealed by Laws, 1991, ch. 573, § 141, eff from and after July 1, 1991.

[Codes, 1857, ch. 55, art. 2; 1871, § 1540; 1880, § 2480; 1892, § 1634; 1906, § 1809; Hemingway's 1917, § 1442; 1930, § 1435; 1942, § 786]

Editor's Note — Former § 11-19-17 provided for the issuing of a summons on filing the declaration.

§ 11-19-19. Answer and defense.

The defendants, or any of them, shall be allowed to answer or otherwise defend the action, either jointly or separately. The answer, if the defendant do not admit the plaintiff's title, shall be "not guilty," which shall be filed within the like time as required in personal actions; and under said answer the defendant may give in evidence any lawful defense to the action not inconsistent with the other provisions of this chapter. Any defendant may defend for a part only of the premises in question; and in such case the part shall be described in the answer with the same certainty required in the complaint.

SOURCES: Codes, 1857, ch. 55, art. 3; 1871, § 1541; 1880, § 2481; 1892, § 1635; Laws, 1906, § 1810; Hemingway's 1917, § 1443; Laws, 1930, § 1436; Laws, 1942, § 787; Laws, 1991, ch. 573, § 39, eff from and after July 1, 1991.

Cross References — Seizure of person or property, see Miss. R. Civ. P. 64.

JUDICIAL DECISIONS

1. In general.

Under "not guilty" the defendant cannot disprove his possession. A denial of possession must be specially pleaded. *Bernard v. Elder*, 50 Miss. 336 (1874).

A plea setting up the statute of limita-

tions is a nullity, that defense can be made under the general issue. *Hutto v. Thornton*, 44 Miss. 166 (1870); *Wilson v. Williams' Heirs*, 52 Miss. 487 (1876); *Dean v. Tucker*, 58 Miss. 487 (1882).

RESEARCH REFERENCES

ALR. Defense of adverse possession or statute of limitations as available under general denial or plea of general issue in ejectment action. 39 A.L.R.2d 1426.

Am Jur. 25 Am. Jur. 2d, Ejectment §§ 36, 38, 39.

CJS. 28 C.J.S., Ejectment §§ 63-67.

§ 11-19-21. Pleading amended as to description of premises.

If the premises be not described with sufficient certainty in the complaint or answer, the court or judge may order the pleading to be amended so as to contain a sufficient description. If either party fail to comply with such order, judgment may be entered as for want of a complaint or answer, according to the circumstances of the case.

SOURCES: Codes, 1857, ch. 55, art. 6; 1871, § 1544; 1880, § 2484; 1892, § 1636; Laws, 1906, § 1811; *Hemingway's* 1917, § 1444; Laws, 1930, § 1437; Laws, 1942, § 788; Laws, 1991, ch. 573, § 40, eff from and after July 1, 1991.

Cross References — Procedural rules applicable to civil actions, see Miss. R. Civ. P. 1 et seq.

Seizure of person or property, see Miss. R. Civ. P. 64.

RESEARCH REFERENCES

Am Jur. 25 Am. Jur. 2d, Ejectment §§ 33-39.

CJS. 28 C.J.S., Ejectment §§ 60, 70.

§ 11-19-23. Forms of proceedings.

Declarations, writs, and pleas in the form or to the effect of the precedents appended hereto, shall be good and sufficient for all purposes in proceedings under this chapter.

SOURCES: Codes, 1857, ch. 55, art. 35; 1871, § 1547; 1880, § 2487; 1892, § 1637; Laws, 1906, § 1812; *Hemingway's* 1917, § 1445; Laws, 1930, § 1438; Laws, 1942, § 789.

Cross References — Procedural rules applicable to civil actions, see Miss. R. Civ. P. 1 et seq.

Seizure of person or property, see Miss. R. Civ. P. 64.

JUDICIAL DECISIONS

1. In general.

The extent to which rescission from the common law is conceded by this section

[Code 1942, § 789] is limited to the prescribed forms. *Burns v. Allen*, 202 Miss. 240, 31 So. 2d 125 (1947).

§ 11-19-25. Form of declaration.

"The State of Mississippi

In the circuit court

County of _____

_____ term,

A.D. _____

"A B, plaintiff, claims the right to possession of a tract of land, situated in _____ County, containing _____ acres, more or less, and being more particularly described as follows: (here insert legal description of premises); and that the defendant wrongfully deprives him of the possession thereof, for which damage in the amount of _____ Dollars are here demanded.

"E F, Attorney for Plaintiff."

If mesne profits be demanded, add to the above form the following:

"And the plaintiff also demands of the defendant the sum of _____ Dollars for the use and occupation of the said land by the defendant."

SOURCES: Codes, 1892, § 1638; Laws, 1906, § 1813; Hemingway's 1917, § 1446; Laws, 1930, § 1439; Laws, 1942, § 790; Laws, 1991, ch. 573, § 41, eff from and after July 1, 1991.

Cross References — Procedural rules applicable to civil actions, see Miss. R. Civ. P. 1 et seq.

Seizure of person or property, see Miss. R. Civ. P. 64.

JUDICIAL DECISIONS

1. In General.

Mesne profits up to the trial are recoverable in the action, and the demand for

use and occupation is barred in six years—not three. *Dean v. Tucker*, 58 Miss. 487 (1882).

§§ 11-19-27 through 11-19-51. Repealed.

Repealed by Laws, 1991, ch. 573, § 141, eff from and after July 1, 1991.

§ 11-19-27. [Codes, 1892, § 1639; 1906, § 1814; Hemingway's 1917, § 1447; 1930, § 1440; 1942, § 791]

§ 11-19-29. [Codes, 1892, § 1640; 1906, § 1815; Hemingway's 1917, § 1448; 1930, § 1441; 1942, § 792]

§ 11-19-31. [Codes, 1892, § 1641; 1906, § 1816; Hemingway's 1917, § 1449; 1930, § 1442; 1942, § 793]

§ 11-19-33. [Codes, 1892, § 1642; 1906, § 1817; Hemingway's 1917, § 1450; 1930, § 1443; 1942, § 794]

§ 11-19-35. [Codes, 1892, § 1643; 1906, § 1818; Hemingway's 1917, § 1451; 1930, § 1444; 1942, § 795]

§ 11-19-37. [Codes, 1892, § 1644; 1906, § 1819; Hemingway's 1917, § 1452; 1930, § 1445; 1942, § 796]

§ 11-19-39. [Codes, 1892, § 1645; 1906, § 1820; Hemingway's 1917, § 1453; 1930, § 1446; 1942, § 797]

§ 11-19-41. [Codes, 1857, ch. 55, art. 8; 1871, § 1546; 1880, § 2486; 1892, § 1646; 1906, § 1821; Hemingway's 1917, § 1454; 1930, § 1447; 1942, § 798]

§ 11-19-43. [Codes, 1857, ch. 55, art. 5; 1871, § 1543; 1880, § 2483; 1892, § 1647; 1906, § 1822; Hemingway's 1917, § 1455; 1930, § 1448; 1942, § 799]

§ 11-19-45. [Codes, 1857, ch. 55, art. 7; 1871, § 1545; 1880, § 2485; 1892, § 1648; 1906, § 1823; Hemingway's 1917, § 1456; 1930, § 1449; 1942, § 800]

§ 11-19-47. [Codes, 1857, ch. 55, art. 9; 1871, § 1548; 1880, § 2488; 1892, § 1649; 1906, § 1824; Hemingway's 1917, § 1457; 1930, § 1450; 1942, § 801]

§ 11-19-49. [Codes, 1857, ch. 55, art. 10; 1871, § 1549; 1880, § 2489; 1892, § 1650; 1906, § 1825; Hemingway's 1917, § 1458; 1930, § 1451; 1942, § 802]

§ 11-19-51. [Codes, 1857, ch. 55, art. 11; 1871, § 1550; 1880, § 2490; 1892, § 1651; 1906, § 1826; Hemingway's 1917, § 1459; 1930, § 1452; 1942, § 803]

Editor's Note — Former § 11-19-27 was a form of summons.

Former § 11-19-29 was a form of plea by tenant defending for whole.

Former § 11-19-31 was a form of plea where tenant defends for part.

Former § 11-19-33 was a form of plea by landlord defending separately.

Former § 11-19-35 was a form of plea by any other than the landlord.

Former § 11-19-37 was a form of plea by landlord and tenant defending.

Former § 11-19-39 was a form of plea by other than landlord defending with the tenant.

Former § 11-19-41 pertained to denying possession by special plea.

Former § 11-19-43 provided that a plea of not guilty was an admission of possession.

Former § 11-19-45 pertained to judgments by default.

Former § 11-19-47 pertained to a judgment when the defense was limited to a part of the premises.

Former § 11-19-49 pertained to discontinuances.

Former § 11-19-51 pertained to the situation where one of several defendants retracts his plea and confesses the action.

§ 11-19-53. Right to discover details of claim or title to premises.

After issue joined in ejectment, either party may discover the details of the other's claim or title to the premises in question, and the response thereto shall include a short abstract of such documentary evidences of title as the party may intend to give in evidence on the trial, and a clear and succinct statement of the substance of any and all lost or destroyed documents the contents of which he may expect to prove. If title be claimed by inheritance, or if claimed on any fact which rests in parol, the facts shall be stated. In case of claim by inheritance, if either party demand it, the other shall give the ages of the several persons to whom the land descended, and the date of the death of the person from whom they inherited the premises. If any document referred to in the response to such discovery request made by law be recorded, it shall also state where it is recorded, or, if not recorded, then it shall include copies of such

as are in the possession of the party, with the names of the subscribing witnesses thereto, if any. The discovery response shall be served within the time and in the manner prescribed by the Mississippi Rules of Civil Procedure and, in default thereof, evidence of such title shall not be given on the trial. In all cases, the evidence of title shall be confined to the matters contained in the discovery response.

SOURCES: Codes, 1857, ch. 55, art. 12; 1871, § 1551; 1880, § 2491; 1892, § 1652; Laws, 1906, § 1827; Hemingway's 1917, § 1460; Laws, 1930, § 1453; Laws, 1942, § 804; Laws, 1991, ch. 573, § 42, eff from and after July 1, 1991.

Cross References — Procedural rules applicable to civil actions, see Miss. R. Civ. P. 1 et seq.

Seizure of person or property, see Miss. R. Civ. P. 64.

JUDICIAL DECISIONS

1. Bill of particulars.
2. —Amendment.

1. Bill of particulars.

Where plaintiffs in ejectment in their bill of particulars deraign title by inheritance from their father, who, they claim, acquired title by adverse possession, they are confined to the title outlined, and may not recover by showing a different title by inheritance from their mother. *Smith v. Whittington*, 112 Miss. 759, 73 So. 785 (1917).

Party rendering a bill of particulars not required to inform his adversary of evidence which he will introduce to show the invalidity of any deed or other source of title through which the adversary may claim. *Mitchell v. Tubb*, 107 Miss. 221, 65 So. 216 (1914).

Plaintiff in ejectment who deduces a perfect title from common source need not prove title from the government. *Richards v. Lee*, 91 Miss. 657, 45 So. 570 (1908).

Defendant in ejectment should not have been permitted to introduce any evidence on failure to furnish a bill of particulars after demand made on him in strict compliance with Code 1892, § 1652. *W.C. Early & Co. v. Long*, 89 Miss. 285, 42 So. 348 (1906).

The statute expressly confines the parties in an action of ejectment, where they have filed such bills, to the evidence spec-

ified in their bills of particulars of title. *Goforth v. Stingily*, 79 Miss. 398, 30 So. 690 (1901).

If the bills of particulars of the parties deraign title from a common source, plaintiff need not give evidence of title in that source, as the bill of particulars, when filed, is an admission of record that the party claims title as therein indicated. *Gillum v. Case*, 67 Miss. 588, 7 So. 551 (1890).

2. —Amendment.

In ejectment it is not reversible error to deny plaintiff's application to amend his bill of particulars of title under this section [Code 1942, § 804], where the same was made after the jury was impaneled and after undue delay, without explaining the delay or submitting the amendment proposed to the court. *Goforth v. Stingily*, 79 Miss. 398, 30 So. 690 (1901).

Where the defendant files his bill of particulars with the clerk, instead of delivering it to the plaintiff, and because thereof plaintiff objected to any evidence of title by defendant, it was not error to overrule such objection, if the court offered to continue the case if plaintiff were taken by surprise. A defendant may be allowed to amend his bill of particulars on the trial by citing the correct pages of deed books. *Summers v. Brady*, 56 Miss. 10 (1878).

RESEARCH REFERENCES

ALR. Comment Note: Common source of title doctrine. 5 A.L.R.3d 375.

Am Jur. 9 Am. Jur. Pl & Pr Forms (Rev), Ejectment, Form 13 (Bill of particu-

lars and abstract of documentary evidence of title).

CJS. 28 C.J.S., Ejectment § 72.

§ 11-19-55. Either party may have a survey made.

In case either party shall desire a survey to be made of the premises sued for in ejectment, he may cause the same to be made, after the institution of the suit, by applying to the clerk of the court in which the suit is brought to issue a commission for that purpose, directed to the county surveyor, or other surveyor, authorizing him to make a survey of the premises, and report the same, under oath, to the court at the next term. Such a survey shall not be made without first giving five days' notice to the opposite party at the time of making the same. The party at whose instance the survey was made shall pay the expenses thereof, but may recover the same as costs, in case he succeed in the action and the judgment be that the survey was necessary in deciding the issue.

SOURCES: Codes, 1857, ch. 55, art. 21; 1871, § 1558; 1880, § 2492; 1892, § 1653; Laws, 1906, § 1828; Hemingway's 1917, § 1461; Laws, 1930, § 1454; Laws, 1942, § 805.

Cross References — Procedural rules applicable to civil actions, see Miss. R. Civ. P. 1 et seq.

Seizure of person or property, see Miss. R. Civ. P. 64.

JUDICIAL DECISIONS

1. In general.

Either party may introduce in evidence surveys made after the institution of the suit, and the testimony of the surveyors in reference thereto. Cannon v. Yarbrough, 127 Miss. 189, 89 So. 911 (1921).

Code 1892, § 1653, does not modify the rule of evidence which permits a party to

introduce maps of the premises and testimony of the surveyors who made the survey explanatory thereof, and such maps and testimony are admissible, although the survey referred to therein was not made in compliance with the provisions of the code. Lenoir v. People's Bank, 87 Miss. 559, 40 So. 5 (1906).

§ 11-19-57. Action not abated by death.

The death of a plaintiff or defendant in ejectment shall not cause the action to abate, but it may be continued after timely substitution of parties as prescribed by the Mississippi Rules of Civil Procedure.

SOURCES: Codes, 1857, ch. 55, art. 22; 1871, § 1559; 1880, § 2493; 1892, § 1654; Laws, 1906, § 1829; Hemingway's 1917, § 1462; Laws, 1930, § 1455; Laws, 1942, § 806; Laws, 1991, ch. 573, § 43, eff from and after July 1, 1991.

Cross References — Actions which survive generally, see § 91-7-233.

Procedural rules applicable to civil actions, see Miss. R. Civ. P. 1 et seq.

Seizure of person or property, see Miss. R. Civ. P. 64.

§§ 11-19-59 through 11-19-79. Repealed.

Repealed by Laws, 1991, ch. 573, § 141, eff from and after July 1, 1991.

- § 11-19-59. [Codes, 1857, ch. 55, art. 23; 1871, § 1560; 1880, § 2494; 1892, § 1655; 1906, § 1830; Hemingway's 1917, § 1463; 1930, § 1456; 1942, § 807]
- § 11-19-61. [Codes, 1857, ch. 55, art. 24; 1871, § 1561; 1880, § 2495; 1892, § 1656; 1906, § 1831; Hemingway's 1917, § 1464; 1930, § 1457; 1942, § 808]
- § 11-19-63. [Codes, 1857, ch. 55, art. 25; 1871, § 1562; 1880, § 2496; 1892, § 1657; 1906, § 1832; Hemingway's 1917, § 1465; 1930, § 1458; 1942, § 809]
- § 11-19-65. [Codes, 1857, ch. 55, art. 26; 1871, § 1563; 1880, § 2497; 1892, § 1658; 1906, § 1833; Hemingway's 1917, § 1466; 1930, § 1459; 1942, § 810]
- § 11-19-67. [Codes, 1857, ch. 55, art. 27; 1871, § 1564; 1880, § 2498; 1892, § 1659; 1906, § 1834; Hemingway's 1917, § 1467; 1930, § 1460; 1942, § 811]
- § 11-19-69. [Codes, 1857, ch. 55, art. 28; 1871, § 1565; 1880, § 2499; 1892, § 1660; 1906, § 1835; Hemingway's 1917, § 1468; 1930, § 1461; 1942, § 812]
- § 11-19-71. [Codes, 1857, ch. 55, art. 29; 1871, § 1566; 1880, § 2500; 1892, § 1661; 1906, § 1836; Hemingway's 1917, § 1469; 1930, § 1462; 1942, § 813]
- § 11-19-73. [Codes, 1857, ch. 55, art. 30; 1871, § 1567; 1880, § 2501; 1892, § 1662; 1906, § 1837; Hemingway's 1917, § 1470; 1930, § 1463; 1942, § 814]
- § 11-19-75. [Codes, 1857, ch. 55, art. 31; 1871, § 1568; 1880, § 2502; 1892, § 1663; 1906, § 1838; Hemingway's 1917, § 1471; 1930, § 1464; 1942, § 815]
- § 11-19-77. [Codes, 1857, ch. 55, art. 34; 1871, § 1571; 1880, § 2515; 1892, § 1664; 1906, § 1839; Hemingway's 1917, § 1472; 1930, § 1465; 1942, § 816]
- § 11-19-79. [Codes, 1857, ch. 55, art. 14; 1871, § 1552; 1880, § 2503; 1892, § 1665; 1906, § 1840; Hemingway's 1917, § 1473; 1930, § 1466; 1942, § 817]

Editor's Note — Former § 11-19-59 pertained to the situation where one of several plaintiffs died.

Former § 11-19-61 pertained to the situation where one of several plaintiffs died after verdict or judgment.

Former § 11-19-63 pertained to the situation where a plaintiff died and his rights did not survive.

Former § 11-19-65 pertained to the situation where the sole plaintiff died after verdict.

Former § 11-19-67 pertained to the situation where one of several defendants died before judgment.

Former § 11-19-69 pertained to the situation where all defendants died before trial.

Former § 11-19-71 pertained to the situation where all defendants died after verdict.

Former § 11-19-73 pertained to the situation where one of several defendants who defended separately died.

Former § 11-19-75 pertained to the situation where one of several defendants who defended separately for the same property which another defendant defended dies.

Former § 11-19-77 defined "legal representative."

Former § 11-19-79 pertained to the trial and its incidents.

§ 11-19-81. When title of plaintiff has expired.

If it appear at the trial that the plaintiff or plaintiffs, or one (1) of them, was, at the commencement of the action, entitled to recover possession of the premises in question, or of some part thereof, but that his or their title has

expired at the time of the trial, the plaintiff or plaintiffs so entitled shall, notwithstanding such expiration, have a verdict according to the fact that he had such right of recovery at the commencement of the action, and shall recover his costs of suit; but as to the premises claimed, the judgment shall be that the plaintiff be involuntarily dismissed.

SOURCES: Codes, 1857, ch. 55, art. 15; 1871, § 1553; 1880, § 2504; 1892, § 1666; Laws, 1906, § 1841; Hemingway's 1917, § 1474; Laws, 1930, § 1467; Laws, 1942, § 818; Laws, 1991, ch. 573, § 44, eff from and after July 1, 1991.

Cross References — Procedural rules applicable to civil actions, see Miss. R. Civ. P. 1 et seq.

Seizure of person or property, see Miss. R. Civ. P. 64.

§ 11-19-83. Repealed.

Repealed by Laws, 1991, ch. 573, § 141, eff from and after July 1, 1991.

[Codes, 1857, ch. 55, art. 16; 1871, § 1554; 1880, § 2505; 1892, § 1667; 1906, § 1842; Hemingway's 1917, § 1475; 1930, § 1468; 1942, § 819]

Editor's Note — Former § 11-19-83 provided for the successful party to recover costs.

§ 11-19-85. Trial of action between cotenants.

In case the action be brought by some one of several persons entitled as joint tenants, tenants in common, or coparceners, any joint tenant, tenant in common, or coparcener defending the action, may give notice with his answer or other defense that he admits the right of the plaintiff to an undivided share of the property, stating what share, but denies any actual ouster of him from the property. Upon the trial of the issue, if it appear that the defendant is a joint tenant, tenant in common, or coparcener with the plaintiff, and actual ouster shall not be proved, then the plaintiff shall be involuntarily dismissed, with costs. But if it be proved either that the defendant is not a joint tenant, tenant in common, or coparcener, or that an actual ouster had taken place, then the jury shall so find by the verdict, and the plaintiff shall have judgment in accordance with the verdict for the recovery of possession and costs.

SOURCES: Codes, 1857, ch. 55, art. 18; 1871, § 1555; 1880, § 2506; 1892, § 1668; Laws, 1906, § 1843; Hemingway's 1917, § 1476; Laws, 1930, § 1469; Laws, 1942, § 820; Laws, 1991, ch. 573, § 45, eff from and after July 1, 1991.

Cross References — Procedural rules applicable to civil actions, see Miss. R. Civ. P. 1 et seq.

Seizure of person or property, see Miss. R. Civ. P. 64.

JUDICIAL DECISIONS

1. In general.

From an early date, it has been recognized in this jurisdiction that the entry of

an heir into the possession of property with a notorious claim of exclusive right may dispossess the other heirs, his

cotenants. *Bayless v. Alexander*, 245 So. 2d 17 (Miss. 1971).

Under a former enactment of these provisions (§§ 2506, 2512, Code of 1880), a tenant in common who had been ousted by

his co-tenant might maintain a judgment against him and recover rents and profits in the same action. *Clay v. Field*, 115 U.S. 260, 6 S. Ct. 36, 29 L. Ed. 375 (1885).

§ 11-19-87. When a crop is growing on the land.

If the jury find for the plaintiff in an action of ejectment, and the defendant have a crop then planted and growing upon the premises in question, it shall assess a reasonable rent for the plaintiff to receive for the use of the premises, for such time as it may think necessary for the defendant to make and gather his crop. If the defendant enter into bond with security, to be approved by the court, or by the clerk in vacation, in a penalty of double the amount of rent so assessed, payable to the plaintiff, conditioned for the payment of the rent assessed at the expiration of the term fixed by the jury for the defendant to hold possession of the premises, then a writ of possession shall not issue upon the judgment in the action, until the expiration of the time so allowed by the jury. The bond shall be filed in the office of the clerk of the court, and, if forfeited, shall have the force and effect of a judgment, and execution may issue thereon against the principal and sureties as upon other judgments in the court.

SOURCES: Codes, *Hutchinson's* 1848, ch. 61, art. 1 (88), 1857, ch. 55, art. 19; 1871, § 1556; 1880, § 2507; 1892, § 1669; Laws, 1906, § 1844; *Hemingway's* 1917, § 1477; Laws, 1930, § 1470; Laws, 1942, § 821.

Cross References — Landlord's lien for supplies furnished sharecropper, see § 85-7-1.

Other landlord's liens on agricultural products, see §§ 89-7-51, 89-7-53.

Seizure of person or property, see Miss. R. Civ. P. 64.

RESEARCH REFERENCES

Am Jur. 21A *Am. Jur. 2d*, Crops §§ 54-57.

§ 11-19-89. Proceedings as to crop upon affirmance of judgment in Supreme Court.

If a judgment in favor of the plaintiff in an action of ejectment be affirmed by the Supreme Court, and the appellant have a crop then planted and growing upon the premises in question, and shall file with the clerk of the circuit court in which the judgment was recovered an affidavit of the fact, and shall undertake, in writing, with such sureties and such sum as the clerk may require, to pay to the opposite party the rent which may be adjudged to be paid for the use and occupation of said premises until the end of the current year, a writ of possession shall not issue until the end of the year, and the affidavit and security for rent shall be filed by the clerk among the papers in the case. The clerk may examine the parties and other persons on oath as to the value

of such rent and the sufficiency of the sureties, and may require their statements to be written and signed by them.

SOURCES: Codes, 1880, §§ 2508, 2509; 1892, § 1670; Laws, 1906, § 1845; Hemingway's 1917, § 1478; Laws, 1930, § 1471; Laws, 1942, § 822.

Cross References — Seizure of person or property, see Miss. R. Civ. P. 64.

§ 11-19-91. Judgment on the bond in proceedings involving crop.

If such rent be not paid, on motion of the plaintiff, a motion to assess damages shall be executed at the next or any future term of the circuit court to ascertain the value of the rent of said premises, and judgment shall be rendered on the verdict for the amount found by the jury against the parties bound on such undertaking for rent. If any have died, like proceedings shall be had as provided in case of the death of any of the sureties on the bond of a claimant of personal property levied on under execution before final judgment.

SOURCES: Codes, 1880, § 2510; 1892, § 1671; Laws, 1906, § 1846; Hemingway's 1917, § 1479; Laws, 1930, § 1472; Laws, 1942, § 823; Laws, 1991, ch. 573, § 46, eff from and after July 1, 1991.

Cross References — Seizure of person or property, see Miss. R. Civ. P. 64.

§ 11-19-93. Exceptions to insufficient bond.

If the plaintiff allege that the amount of the security required by the clerk for rent to prevent the issuance of a writ of possession is insufficient, the circuit judge, in term time or vacation, shall hear the allegations and inquire into the matter, and may order a new undertaking for the rent to be given within such time as he shall prescribe; and if it shall not be given, a writ of possession shall be issued as if security for rent had not been given. Five days' notice of such complaint to the circuit judge shall be given to the opposite party.

SOURCES: Codes, 1880, § 2511; 1892, § 1672; Laws, 1906, § 1847; Hemingway's 1917, § 1480; Laws, 1930, § 1473; Laws, 1942, § 824.

Cross References — Seizure of person or property, see Miss. R. Civ. P. 64.

§ 11-19-95. Mesne profits and compensation for improvements.

In all cases where the defendant in ejectment would be liable for mesne profits and damages, the plaintiff may declare for and recover the same in the action of ejectment, or he may have his action for mesne profits after the recovery in ejectment as heretofore. It shall be lawful in all cases for the defendant in ejectment, whether the plaintiff demand mesne profits or damages or not, or in an action of mesne profits, to plead the value of all permanent, valuable and not ornamental improvements made on the land by

the defendant, or by any one under whom he holds, before notice of the intention of the plaintiff to bring the action, and all taxes that may have been lawfully paid on the land by defendant or those under whom he holds up to the date of trial, including interest, costs, and damages incident to such taxes; but a defendant shall not be entitled to such compensation for improvements or taxes unless he claim the premises under some deed or contract of purchase acquired or made in good faith.

SOURCES: Codes, Hutchinson's 1848, ch. 59, art. 13 (1); 1857, ch. 55, art. 20; 1871, § 1557; 1880, § 2512; 1892, § 1673; Laws, 1906, § 1848; Hemingway's 1917, § 1481; Laws, 1930, § 1474; Laws, 1942, § 825.

Cross References — Finding value of improvements, see § 11-19-97.
Seizure of person or property, see Miss. R. Civ. P. 64.

JUDICIAL DECISIONS

1. Mesne profits, generally.
2. Improvements.
3. —Good faith.
4. Setting off improvements and mesne profits.

1. Mesne profits, generally.

The statute of limitations of six years applies to the demand for rents asserted by plaintiff in ejectment. *Lindenmayer v. Gunst*, 70 Miss. 693, 13 So. 252, 35 Am. St. R. 685 (1893).

Under a former enactment of these provisions (§§ 2506, 2512, Code of 1880), a tenant in common who had been ousted by his co-tenant might maintain a judgment against him and recover rents and profits in the same action. *Clay v. Field*, 115 U.S. 260, 6 S. Ct. 36, 29 L. Ed. 375 (1885).

Remaindermen cannot, in ejectment or any other action, recover mesne profits which have accrued during the continuance of the life estate, and the owner of the life estate cannot recover compensation for improvements made during the existence of such estate. *Pass v. McLendon*, 62 Miss. 580 (1885).

The statute of limitations of six years, and not three, applies to a demand for mesne profits. *Dean v. Tucker*, 58 Miss. 487 (1882).

The plaintiff, if he demand mesne profits in his ejectment suit, may recover them up to the trial. *Bell v. Medford*, 57 Miss. 31 (1879); *Dean v. Tucker*, 58 Miss. 487 (1882).

The judgment, where the mesne profits are demanded, is a bar to a subsequent

action for the mesne profits which accrued pending the suit. *Bell v. Medford*, 57 Miss. 31 (1879).

It is optional with the plaintiff to demand the mesne profits in his action of ejectment, or he may sue for them in a subsequent action. *Emrich v. Ireland*, 55 Miss. 390 (1877).

2. Improvements.

Where specific performance was denied purchaser who defaulted, court properly awarded purchaser sum for permanent and valuable improvements. *Swalm v. Gill*, 151 Miss. 630, 118 So. 446 (1928).

Statute followed by court of equity in awarding compensation to occupant of land when dispossessed by the true owner thereof. *Pritchett v. Stevens*, 126 Miss. 221, 88 So. 627 (1921); *Pritchett v. Hibbler*, 126 Miss. 379, 88 So. 882 (1921).

Compensation for improvements is applicable only where there can be a demand for mesne profits, and improvements put upon land by the life tenant pass to the remainderman, and as the life tenant is not liable for rents, he is not entitled to compensation for improvements made during the existence of his estate. *Deanes v. Whitfield*, 107 Miss. 273, 65 So. 246 (1914).

A defendant, purchaser for value in good faith, can obtain relief for valuable, permanent and not ornamental improvements in a suit at law and has no ground because thereof for a suit in equity. *Demourelle v. Piazza*, 77 Miss. 433, 27 So. 623 (1900).

As to improvements made on land acquired under guardian sale that is void, see *Hicks v. Blakeman*, 74 Miss. 459, 21 So. 7 (1896).

The defendant in ejectment can recover compensation for improvements put upon the land sued upon only where the plaintiff has the right to demand mesne profits of the defendant. *Pass v. McLendon*, 62 Miss. 580 (1885).

The value of improvements should be assessed on a basis coextensive in time with the estimate of rents which they contributed to produce, so as to allow the defendant for all his improvements of which the plaintiff recovers the benefit. *Johnson v. Futch*, 57 Miss. 73 (1879).

If the defendant omit to claim and establish the value of improvements, he cannot get relief in equity. *Gaines v. Kennedy*, 53 Miss. 103 (1876).

In ejectment the defendant is entitled to pay for all improvements not ornamental in their character. The notice with the plea, stating the nature and value of the improvements, was sufficiently definite. *Wilson v. Williams' Heirs*, 52 Miss. 487 (1876).

3. —Good faith.

Where taxpayer notified patentee that he had no title because of insufficiency of description in assessment roll and list of lands struck off, patentee made further improvements at his peril, and could not recover therefor on cancellation of his title. *Brown v. Womack*, 181 Miss. 66, 178 So. 785 (1938).

"Good faith" of a purchaser of land, as used in statute allowing compensation for improvements made by such purchaser, is not used in the technical sense applied to conveyances, but means only that purchase money was genuinely paid without any knowledge or suspicion of fraud, either by purchaser or vendor. *Brunt v. McLaurin*, 178 Miss. 86, 172 So. 309 (1937).

Purchaser held entitled under statute to value of house built during his possession of land in good faith belief that he had full title, as against heirs of wife of his remote grantor who owned a half interest, irrespective of his constructive notice of their rights by recorded deed in the chain

of title. *Brunt v. McLaurin*, 178 Miss. 86, 172 So. 309 (1937).

Where defendants claimed title to the land sued for, not only through complainants' ancestor, but chiefly through the purchaser of land at a tax sale, without actual or constructive notice of a prior deed from such purchaser to another through whom complainants also claimed, defendants were entitled to a sum expended for improvements upon decreeing title to be in complainants. *Tinnin v. Brown*, 98 Miss. 378, 53 So. 780, *Am. Ann. Cas.* 1913A, 1081 (1910).

A defendant in ejectment cannot claim for improvements unless, when he placed them on the land, he was claiming under some deed or contract of purchase made or acquired in good faith. It is not sufficient that at the time he honestly expected the owner, whose title he recognized, would eventually give him the land. *Thomas v. Thomas*, 69 Miss. 564, 13 So. 666 (1891).

If defendant know the facts but mistake the law, he is not, in case the law be against him, a bona fide purchaser. *Holmes v. McGee*, 64 Miss. 129, 8 So. 169 (1886).

The bona fide possessor of lands entitled to improvements is one who not only supposes himself to be the true owner, but who is ignorant that his title is contested by another claiming a better right. The want of good faith cannot be inferred merely because the defect of title could have been ascertained by an examination of the records. *Cole v. Johnson*, 53 Miss. 94 (1876); *Gaines v. Kennedy*, 53 Miss. 103 (1876); *Emrich v. Ireland*, 55 Miss. 390 (1877); *Citizens' Bank v. Costanera*, 62 Miss. 825 (1884).

4. Setting off improvements and mesne profits.

In suit to cancel tax title to land, evidence held to support decree awarding plaintiff rents for part of years defendant had possession, and setting off defendant's improvement against rents of remaining years. *Brown v. Womack*, 181 Miss. 66, 178 So. 785 (1938).

The effect of this section [Code 1942, § 825] is to require the jury to find in favor of a successful plaintiff in ejectment the amount of rents and profits, and, as against this, in favor of defendant, the

value of improvements and taxes, in all cases where the declaration demands mesne profits or where the defendant claims for improvements and taxes. The assertion of such claim by either party necessarily involves the whole matter of the accounting as provided for in this section. *Gillum v. Case*, 71 Miss. 848, 16 So. 236 (1894).

In ejectment for a tract of land, only a portion of which the defendant had improved, the jury, in assessing mesne profits and the value of the improvements, may deal with the entire tract together, although the defendant claims the improved part under separate conveyance. *Johnson v. Futch*, 57 Miss. 73 (1879).

RESEARCH REFERENCES

ALR. Compensation for improvements made or placed on premises of another by mistake. 57 A.L.R.2d 263.

Private improvement of land dedicated but not used as street as estopping public rights. 36 A.L.R.4th 625.

Am Jur. 25 Am. Jur. 2d, Ejectment §§ 54-57.

41 Am. Jur. 2d, Improvements §§ 5 et seq.

CJS. 28 C.J.S., Ejectment §§ 139 et seq.

§ 11-19-97. How improvements estimated and judgment therefor.

The jury shall find the actual cash value of such improvements and the amount of taxes paid, the value of the mesne profits and damages, and the actual cash value of the land without the improvements. Where the value of the improvements and taxes exceed the value of the mesne profits and damages, the defendant shall have a lien upon the land for the difference between the value of the mesne profits and the value of the improvements and taxes so found, and execution shall not issue in favor of the plaintiff until he shall have paid the amount so due to the defendant. Unless the plaintiff, within three months after the rendition of the verdict, pay the amount so due, the defendant may pay to the plaintiff the assessed value of the land with interest from the date of the verdict, and pay the costs of the suit, and thereupon the execution of the judgment for the recovery of the land shall be perpetually stayed. If the defendant fail to pay to the plaintiff the value of the land so assessed, with interest and costs of suit, within three months after the expiration of the time allowed the plaintiff for making payment, an execution shall issue for the sale of the land recovered in the ejectment.

SOURCES: Codes, *Hutchinson's* 1848, ch. 59, art. 13 (3); 1857, ch. 55, art. 20; 1871, § 1557; 1880, § 2512; 1892, § 1674; Laws, 1906, § 1849; *Hemingway's* 1917, § 1482; Laws, 1930, § 1475; Laws, 1942, § 826.

Cross References — Liens generally, see §§ 85-7-1 et seq.
Seizure of person or property, see Miss. R. Civ. P. 64.

JUDICIAL DECISIONS

1. In general.

If a defendant in ejectment be a purchaser for value in good faith and have

placed valuable permanent, and not ornamental, improvement on the premises, he can obtain adequate relief on account of

said improvements in the suit at law. *Demourelle v. Piazza*, 77 Miss. 433, 27 So. 623 (1900).

Although a plaintiff in ejectment fails to demand or prove mesne profits and rents, if the defendant pleads and is allowed for improvements and pays plaintiff the value of the land, without the improvement as assessed, the latter cannot afterward resort to an independent action to recover of defendant mesne profits. *Gillum v. Case*, 71 Miss. 848, 16 So. 236 (1894).

The remainderman cannot recover mesne profits which accrued during the particular estate and the owner of the particular estate is not entitled to compensation for improvements made during his term. *Pass v. McLendon*, 62 Miss. 580 (1885).

The value of improvements should be assessed on a basis coextensive in time with the estimate of rents and profits, so as to allow the defendant for all of his

improvements of which the plaintiff recovers the benefit. *Johnson v. Futch*, 57 Miss. 73 (1879).

If the suit be for a tract, only a portion of which the defendants have improved, the jury may, in stating the account, deal with the entire tract together, although the defendant claim the improved portion under a separate deed. *Johnson v. Futch*, 57 Miss. 73 (1879).

The plaintiff, if entitled to recover the premises, should be allowed the rents of the property as improved. *Miller v. Ingram*, 56 Miss. 510 (1879).

Where the improvements have been destroyed by a casualty, and the defendant is denied compensation therefor on that account, the amount of the mesne profits or rent which plaintiff may recover is the reasonable value of the rent of the premises without such improvement. *Nixon v. Porter*, 38 Miss. 401 (1860).

RESEARCH REFERENCES

Am Jur. 25 *Am. Jur.* 2d, Ejectment § 57.

41 *Am. Jur.* 2d, Improvements §§ 24 et seq.

CJS. 28 *C.J.S.*, Ejectment §§ 146, 156, 157 et seq.

§ 11-19-99. How proceeds divided in case of sale.

The proceeds of the sale, after payment of costs, shall be divided between the plaintiff and the defendant in proportion to the sums due them respectively as found by the verdict.

SOURCES: Codes, 1857, ch. 55, art. 20; 1871, § 1557; 1880, § 2512; 1892, § 1675; Laws, 1906, § 1850; Hemingway's 1917, § 1483; Laws, 1930, § 1476; Laws, 1942, § 827.

Cross References — Seizure of person or property, see Miss. R. Civ. P. 64.

§ 11-19-101. Reversioner or remainderman to have appeal.

If a tenant for life be impleaded, and judgment given against him for the lands or tenements, then the person to whom the reversion or remainder belongs at the time of such judgment, his heirs or successors, may have an appeal as well in the lifetime of the tenant as after his death. If the judgment be reversed, the tenant, if living, shall be restored to the possession of the lands or tenements, and the party prosecuting the appeal shall be entitled to the arrearages of rent for the same. If the tenant be dead at the time of judgment given on the appeal, then restitution of the lands or tenements shall be made

to the party prosecuting the appeal, together with the arrearages of rent. If the party prosecuting the appeal allege that the judgment first obtained against the tenant was by covin or assent, then restitution shall be made to the party prosecuting such appeal with arrearages of rent, although the tenant be living; but in such case the tenant may have a scire facias against the party appealing if he deny and traverse the covin or assent, but not otherwise.

SOURCES: Codes, 1880, § 2518; 1892, § 1676; Laws, 1906, § 1851; Hemingway's 1917, § 1484; Laws, 1930, § 1477; Laws, 1942, § 828. ~

Cross References — Seizure of person or property, see Miss. R. Civ. P. 64.

RESEARCH REFERENCES

CJS. 28 C.J.S., Ejectment § 136.

§ 11-19-103. Judgment as res adjudicata.

A judgment in an action of ejectment shall be conclusive as to the right of possession established upon the party against whom it is recovered, and upon all persons claiming from, through, or under such party, by title arising after the commencement of the action; but if any person against whom such judgment is recovered shall be, at the time of its recovery, an infant or person of unsound mind, the judgment shall not be a bar to an action commenced by such person, or any one claiming by inheritance from, through, or under him, within three years after the removal of his disability.

SOURCES: Codes, 1857, ch. 55, art. 32; 1871, § 1569; 1880, § 2513; 1892, § 1677; Laws, 1906, § 1852; Hemingway's 1917, § 1485; Laws, 1930, § 1478; Laws, 1942, § 829.

Cross References — Definition of "infant", see § 1-3-21.
Seizure of person or property, see Miss. R. Civ. P. 64.

JUDICIAL DECISIONS

1. In general.

Owner, not made party to and not having notice of an action in ejectment

against a tenant of a tenant, is not affected by the judgment. *Melsheimer v. McKnight*, 92 Miss. 386, 46 So. 827 (1908).

RESEARCH REFERENCES

Am Jur. 25 Am. Jur. 2d, Ejectment § 52.

46 Am. Jur. 2d, Judgments §§ 1044 et seq.

§ 11-19-105. Record may be recorded as a deed.

A certified copy of the complaint, the writ, the answer or other defense, if any, and the judgments in an ejectment suit may be recorded, without acknowledgment by anyone, in the proper record of conveyances of land in the county in which the land is situated; and the same shall be indexed as a deed

from the unsuccessful party to the party in whose favor the final judgment is rendered.

SOURCES: Codes, 1892, § 1678; Laws, 1906, § 1853; Hemingway's 1917, § 1486; Laws, 1930, § 1479; Laws, 1942, § 830; Laws, 1991, ch. 573, § 47, eff from and after July 1, 1991.

Cross References — Recording of instruments, see § 89-5-1.
Seizure of person or property, see Miss. R. Civ. P. 64.

JUDICIAL DECISIONS

1. In general.

Jurisdiction respecting conclusive adjudication of land titles rests alone with circuit and chancery courts, and to limited

extent with county courts. *Vansant v. Dodds*, 164 Miss. 787, 144 So. 688 (1932), error overruled, 164 Miss. 799, 145 So. 613 (1933).

CHAPTER 21

Partition of Property

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REALTY

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§ 11-21-1. Partition by agreement and by arbitration.

Partition of land held by adult joint tenants, tenants in common, and coparceners, may be made by agreement, which shall be evidenced by a writing, signed by the parties, and containing a description of the particular part allotted to each, and recorded in the office of the clerk of the chancery court of the proper county or counties, and shall be binding and conclusive on the parties. They may also bind themselves by written agreement to submit the partition to the arbitrament of one or more persons to be chosen by them, and to abide the partition made by the arbitrators and the articles of submission; and the written award shall be recorded in the office of the clerk of the chancery court of the proper county or counties, and shall be final and conclusive between the parties, unless made or procured by fraud.

SOURCES: Codes, 1857, ch. 36, art. 48; 1871, § 1839; 1880, § 2552; 1892, § 3096; Laws, 1906, § 3520; Hemingway's 1917, § 2832; Laws, 1930, § 2919; Laws, 1942, § 960.

Cross References — Who may submit to arbitration, see § 11-15-1.

Creation of estates in two or more persons, see § 89-1-7.

Partition with respect to condominiums, see §§ 89-9-15, 89-9-35, 89-9-37.

JUDICIAL DECISIONS

1. In general.

Family settlements are favored by the courts, and generally will be permitted to stand even though based on mistake of law or fact where there is absence of conduct otherwise inequitable. *Strong v. Cowsen*, 197 Miss. 282, 19 So. 2d 813 (1944).

Deed of partition executed by heirs of legitimate son of former owner in favor of heirs of illegitimate son pursuant to agreement compromising and settling the disputed claims of the heirs to avoid litigation, the parties at the time of the deed's execution not knowing the true facts, was

not subject to cancelation on the ground of mutual mistake. *Strong v. Cowsen*, 197 Miss. 282, 19 So. 2d 813 (1944).

Life tenants may divide their life estates and remaindermen may accept the partition made. *Leflore v. Flowers*, 117 Miss. 682, 78 So. 513 (1918), on suggestion of error, 118 Miss. 75, 79 So. 60 (1918).

Tenants in common cannot make a partition by agreement binding on a judgment creditor whose lien has attached against the interest of one of them. *Simmons v. Gordon*, 98 Miss. 316, 53 So. 623, Am. Ann. Cas. 1913A,1143 (1910).

RESEARCH REFERENCES

ALR. Right to partition of overriding royalty interest in oil and gas leasehold. 58 A.L.R.3d 1052.

Lack of final settlement of intestate's estate as affecting heir's right to partition of realty. 92 A.L.R.3d 473.

Am Jur. 59 Am. Jur. 2d, Partition §§ 17-28.

14 Am. Jur. Legal Forms 2d, Partition, §§ 193:21-193:41 (Documents providing for and affecting voluntary partition).

CJS. 68 C.J.S., Partition §§ 9-16.

§ 11-21-3. Partition by decree of chancery court.

Partition of land held by joint tenants, tenants in common, or coparceners, having an estate in possession or a right of possession and not in reversion or remainder, whether the joint interest be in the freehold or in a term of years not less than five (5), may be made by judgment of the chancery court of that county in which the lands or some part thereof, are situated; or, if the lands be held by devise or descent, the division may be ordered by the chancery court of the county in which the will was probated or letters of administration granted, although none of the lands be in that county.

However, any person owning an indefeasible fee simple title to an undivided interest in land may procure a partition of said land and have the interest of such person set apart in fee simple free from the claims of life or other tenants, remaindermen or reversioners, provided the life or other tenants, and other known living persons having an interest in the lands, are made defendants if they do not join in the proceeding as plaintiffs.

SOURCES: Codes, 1857, ch. 36, art. 48; 1871, § 1811; 1880, § 2553; 1892, § 3097; Laws, 1906, § 3521; Hemingway's 1917, § 2833; Laws, 1930, § 2920; Laws, 1942, § 961; Laws, 1946, ch. 317, § 1; Laws, 1991, ch. 573, § 48, eff from and after July 1, 1991.

Cross References — Jurisdiction of the chancery court, see § 9-5-81.

Rule that exempt property of a decedent is not subject to partition in certain cases, see § 91-1-23.

Where a person entitled to a distributive share of a deceased's estate may compel distribution, see § 91-7-303.

JUDICIAL DECISIONS

1. In general.
2. Title or interest necessary; parties.
3. Lands of decedent.
4. Lands subject to encumbrance, homestead or dower interest.
5. Jurisdiction and venue.

1. In general.

Mere sentimental attachment to ancestral home did not render the property incapable of partition in kind, or take precedence over the right of a cotenant to have his share set aside where the real property was clearly subject to partition in kind. *Mobley v. Mobley*, 827 So. 2d 714 (Miss. Ct. App. 2002).

Wife's prior unsuccessful divorce action against her husband did not bar her subsequent action for statutory partition of the parties' real and personal property pursuant to Miss. Code Ann. §§ 11-21-3 and 11-21-71; doctrine of *res judicata* did not apply as the divorce and the partition action did not share identity of cause of action. *Miller v. Miller*, 838 So. 2d 295 (Miss. Ct. App. 2002), cert. denied, 837 So. 2d 771 (Miss. Ct. App. 2003).

Chancellor abused his discretion in attempting to fashion a unique remedy to sever a cotenancy, ignoring statutes of the state defining the only lawful method available to accomplish that purpose the right of partition being an absolute right of a tenant in common. *Murphree v. Cook*, 822 So. 2d 1092 (Miss. Ct. App. 2002).

The right to partition property is absolute with the exception of the limitation placed on homestead property. *Cheeks v. Herrington*, 523 So. 2d 1033 (Miss. 1988).

The defense of laches was unavailable in an action for partition of property where there was no "ouster" of the cotenant seeking partition. *Cheeks v. Herrington*, 523 So. 2d 1033 (Miss. 1988).

Question of whether party asserting interest in property, which had been inherited through Mississippi laws of descent

and distribution, should be prohibited in equity from doing so was not appropriate matter for decision on motion for summary judgment, where heir at law did not intend to relinquish any inherited rights by signing final estate decree and signed for sole purpose of settling will contest between children and widow, where evidence existed that persons taking under estate decree also knew of and recognized interest of heir at law in property, and he took action to assert his interest in that property. *Sumrall v. Doggett*, 511 So. 2d 908 (Miss. 1987).

Right of partition is subject to paramount authority and responsibility of Chancery Court to make orders which are necessary and appropriate for care, custody, and maintenance of children of marriage; claim of husband that partition through judicial sale should have been granted instead of awarding wife exclusive use of homestead property was rejected. *Regan v. Regan*, 507 So. 2d 54 (Miss. 1987). But see *Tramel v. Tramel*, 740 So. 2d 286 (Miss. 1999).

Hardship is not defense to right of partition. *Daughtrey v. Daughtrey*, 474 So. 2d 598 (Miss. 1985).

A former husband was properly precluded from partitioning certain real estate owned by his ex-wife and him as tenants in common, where the parties' settlement agreement gave the ex-wife the right to occupy the residence situated on the real estate, and such proposed partition might have had the effect of annulling the ex-wife's right to so occupy the residence. *Rushing v. Rushing*, 414 So. 2d 429 (Miss. 1982).

A divorced wife was not entitled to partition of the former marital home where the property agreement entered into by the parties had provided that the husband would have the exclusive use, possession and control of the home. *Weeks v. Weeks*, 403 So. 2d 148 (Miss. 1981).

Under the rule that all that is necessary for a partition is that the parties be cotenants of whatever to be partitioned, a prior decree of divorce granting the wife exclusive use of the parties' former marital home did not create a property right in the ex-wife which would defeat her own partition action under this section, since the ex-wife had the same status respecting the property after the divorce as she had prior to the divorce. *Blackmon v. Blackmon*, 350 So. 2d 44 (Miss. 1977).

Prior to the 1946 amendment, partition was a possessory proceeding only, and the court could not adjudicate rights of owners of future interests. *Hemphill v. Mississippi State Hwy. Comm'n*, 245 Miss. 33, 145 So. 2d 455 (1962).

Bill which is sufficient in substance and contains prayer for general relief in addition to special prayer that property be sold for partition is sufficient to support decree for partition in kind. *Dantone v. Dantone*, 205 Miss. 420, 38 So. 2d 908 (1949).

Joint interests of tenants in common in a freehold may not be sold for division if it can be partitioned in kind. *Wight v. Ingram-Day Lumber Co.*, 195 Miss. 823, 17 So. 2d 196 (1944).

The burden of establishing the non-susceptibility of joint interests in a freeholder to partition in kind is upon the complainant seeking partition by sale. *Wight v. Ingram-Day Lumber Co.*, 195 Miss. 823, 17 So. 2d 196 (1944).

Whether it is physically possible or economically practicable or whether it will better promote the interests of all parties to decree a partition by sale, depends upon the facts in any particular case. *Wight v. Ingram-Day Lumber Co.*, 195 Miss. 823, 17 So. 2d 196 (1944).

The generality that mineral estates may not be divided in kind may not be determined by judicial notice. *Wight v. Ingram-Day Lumber Co.*, 195 Miss. 823, 17 So. 2d 196 (1944).

The test of feasibility of division in kind of mineral interests held by tenants in common should relate not to the difficulty of ascertainment of that which is speculative, but rather to the practicability of division of that which is apparent. *Wight v. Ingram-Day Lumber Co.*, 195 Miss. 823, 17 So. 2d 196 (1944).

Cross-bill seeking partition of personality and partnership accounting was germane to original bill for partition of specific lands. *Barry v. Mattocks*, 156 Miss. 424, 125 So. 554 (1930).

Suit to correct erroneous boundaries, due to mistake unknown to all parties, is an original suit giving equity power to correct mistake where no innocent party will suffer, and is not a bill of review. *Brown v. Wesson*, 114 Miss. 216, 74 So. 831 (1917).

Partition sale is statutory and not dependent on common law or equity. *Forest Prod. & Mfg. Co. v. Buckley*, 107 Miss. 879, 66 So. 279 (1914).

Partition does not affect rights of remaindermen. *Lawson v. Bonner*, 88 Miss. 235, 40 So. 488, 117 Am. St. R. 738 (1906).

Interest of remaindermen, made party to partition suit, should not be taxed with any costs of proceedings. *Lawson v. Bonner*, 88 Miss. 235, 40 So. 488, 117 Am. St. R. 738 (1906).

Decree for partition is interlocutory and may be modified or reversed any time before final decision. *Sweatman v. Dean*, 86 Miss. 641, 38 So. 231 (1905).

A demand for rents may be joined in a bill for partition. *Medford v. Frazier*, 58 Miss. 241 (1880).

2. Title or interest necessary; parties.

This section allows the joinder of a life estate and the remaindermen to create an estate authorized to institute a suit in partition. *Banks v. Banks*, 367 So. 2d 1364 (Miss. 1979).

Owners of future interests are subject to partition if made parties defendant by persons having possessory estates; and unborn takers of future interests are reached by virtual representation. *Hemphill v. Mississippi State Hwy. Comm'n*, 245 Miss. 33, 145 So. 2d 455 (1962).

The right of the devisee of an interest in land from his father to seek a partition by sale and division of proceeds is not affected by the fact that he has also an interest under his mother's will which contained a provision that the property may be sold only by mutual consent of the interested parties. *Holliday v. Hedge*, 243 Miss. 707, 139 So. 2d 866 (1962).

Owners of an undivided two-thirds interest in land can obtain a partition in kind and so acquire a fee simple title to the parts allotted to them free from the claims of a life tenant in the other one-third interest and contingent remaindermen who might claim such one-third interest, provided that such claimants are made parties to the proceeding. *Copeland v. West*, 202 Miss. 106, 30 So. 2d 610 (1947).

A deed conveying an undivided interest in a residence and reserving to the grantor the right during his lifetime to live on the premises with the grantee, free of rent, which reservation was allegedly violated by the grantee, would not entitle the grantor to partition the property under this section [Code 1942, § 961]. *Hall v. Scott*, 201 Miss. 540, 29 So. 2d 640 (1947).

Under will devising land to wife and son to share and share alike with provision that if son should die before reaching the age of twenty-one his share should go to the heirs of testator's body then living, widow was entitled to partition of a one-half interest therein in fee simple absolute, and the remaining half interest would be set aside under the partition in the same legal aspect and with the same incidents as attached under the will, without adjudicating the rights of parties who may ultimately become vested with an unqualified fee thereto. *Lynch v. Lynch*, 198 Miss. 479, 23 So. 2d 263 (1945), motion overruled, 198 Miss. 479, 23 So. 2d 401 (1945).

Where trusts under a will directing trustees to pay annuity to decedent's widow during her life, to care for an uncle until death and burial, and to divide estate among designated beneficiaries upon liquidation, had not been terminated and the trustees were still in possession, one of the designated beneficiaries was neither a tenant in common nor in possession, nor had the right to possession, and consequently could not maintain a suit to partition lands comprising part of the estate. *Yeates v. Box*, 198 Miss. 602, 22 So. 2d 411 (1945).

Bill by one of several designated beneficiaries seeking partition of lands comprising part of the estate, under will directing trustees to pay an annuity to

decedent's widow during her lifetime, to care for an uncle until death and burial, and to divide the estate among designated beneficiaries upon liquidation, where the trust had not been terminated and the trustees were still in possession, was multifarious insofar as the trustees were concerned, inasmuch as the trustees were not interested in the partition. *Yeates v. Box*, 198 Miss. 602, 22 So. 2d 411 (1945).

Persons owning undivided interests in the minerals in land, the surface of which was owned by one of such persons, were tenants in common of a joint interest in a freehold within the meaning of this section [Code 1942, § 961]. *Wight v. Ingram-Day Lumber Co.*, 195 Miss. 823, 17 So. 2d 196 (1944).

One of the ingredients of a cotenant's title to minerals is the speculative chance which is an acknowledged asset of ownership. *Wight v. Ingram-Day Lumber Co.*, 195 Miss. 823, 17 So. 2d 196 (1944).

Where one of several persons owned the surface to land and half the undivided minerals underlying it and the other half of the undivided interest in the minerals was owned by the others, and upon action for partition by sale of the mineral interests the offer was made to combine the interests of the latter into a single unit for the purpose of division in kind, division in kind was feasible where any division so effected would result in the allotment of units of a size to be usable or merchantable. *Wight v. Ingram-Day Lumber Co.*, 195 Miss. 823, 17 So. 2d 196 (1944).

Undivided interests of several persons in minerals underlying land were capable of division in kind, and it was reversible error to hold that it could only be partitioned by sale. *Wight v. Ingram-Day Lumber Co.*, 195 Miss. 823, 17 So. 2d 196 (1944).

Where testator devised residue of his estate to his widow and minor son, with the provision that if such son should die before he reached 21 years of age, his share should be divided among the heirs of testator's body then living, partition in kind of various interests in certain lands owned by testator at the time of his death would not violate the "reversion and remainder" provision of this section [Code 1942, § 961], since the widow and her son

are tenants in common in possession during the period of his minority, and if he should live beyond 21 years they would be tenants in common of the fee in possession, and if he should die before that time, the heirs of the body of the testator then living would be tenants in common with the widow, there being no right of reversion or remainder involved. *Lynch v. Lynch*, 196 Miss. 276, 17 So. 2d 195 (1944).

Where a trustee under a trust in favor of an incompetent tenant in common was to expend as much of the income and principal as was necessary for the support and maintenance of the incompetent, and was empowered to sell the undivided interest of the incompetent during his lifetime, such trust did not provide for a life estate only, so as to preclude a partition sale without the trustee's consent; and the other tenants in common were entitled to have the property sold in its entirety in view of demurrers admitting that the property was not subject to partition in kind. *Beard v. Rosenzweig*, 190 Miss. 325, 200 So. 261 (1941).

Under this section [Code 1942, § 961] the heirs of the owner of a half interest in land were entitled to a partition of the property which they inherited from such owner, notwithstanding that a co-owner died leaving a widow and children in occupation of the property, since the exemption from partition under Code of 1930, § 1412, applied only to the interest in the property of the deceased co-owner owned by him at the time of his death. *Solomon v. Solomon*, 187 Miss. 22, 192 So. 10 (1939).

Tenants in common of clay, oil and mineral deposits may have interest partitioned, by sale for division of proceeds. *Stern v. Great S. Land Co.*, 148 Miss. 649, 114 So. 739 (1927).

Minor with right of redemption from tax sale may in partition have interest sold if necessary to raise funds for redemption. *Cuevas v. Cuevas*, 145 Miss. 456, 110 So. 865 (1927).

Right to bring partition suit depends on complainant's title and not weakness of defendant's title. *Mallory v. Walton*, 119 Miss. 396, 81 So. 113 (1919).

Beneficiaries under testamentary trust entitled to partition where death of

trustee had extinguished power to sell. *Chandler v. Chandler*, 111 Miss. 525, 71 So. 811 (1916).

Heirs of tenant in common may sue for partition of land, including right of way of railroad. *Hill v. Woodward*, 100 Miss. 879, 57 So. 294, Am. Ann. Cas. 1914A,390 (1911).

Defendant in partition claiming half interest as partner of complainant in whose name title stands, need not make payment into court where he offers to pay for his interest. *Peirce v. Halsell*, 90 Miss. 171, 43 So. 83 (1907).

Without showing title complainant cannot succeed. *Goff v. Cole*, 71 Miss. 46, 13 So. 870 (1893).

It is not essential to the right of partition that the co-tenants should have equal estates. All that is necessary is that they shall be co-tenants of what is to be partitioned. *Black v. Washington*, 65 Miss. 60, 3 So. 140 (1887); *Lynch v. Lynch*, 196 Miss. 276, 17 So. 2d 195 (1944).

The owner in fee simple of one part of a tract of land and of a reversion in the other part, in which other part another person owns a particular estate, the two parts being ascertained, is not entitled to a partition. *Belew v. Jones*, 56 Miss. 342 (1879).

3. Lands of decedent.

Partition of land of deceased person may be had during pendency of administration of his estate and prior to expiration of period for probating of claims, as possession, or right of possession, in tenants in common gives absolute and unconditional right to partition, and sufficiency or insufficiency of personal property to pay debts due by estate is immaterial, although lands remain liable for debts, if any, which personal property is insufficient to pay. *Barnes v. Rogers*, 206 Miss. 887, 41 So. 2d 58 (1949).

Land descended to the heirs of a decedent as tenants in common under this section [Code 1942, § 961] may be partitioned before the estate of the decedent is fully administered or the debts against it probated or paid. *Garrett v. Colvin*, 77 Miss. 408, 26 So. 963 (1899).

In a proceeding to partition the lands of a decedent and to recover against executors de son tort the rights of the parties in

interest should be established as to both the real and personal property per stirpes and not per capita. *Weaver v. Williams*, 75 Miss. 945, 23 So. 649 (1898).

4. Lands subject to encumbrance, homestead or dower interest.

Upon remarriage of a widow, her rights under § 91-1-23, which prevents partition of homestead property, are terminated and the entire property becomes subject to partition by any and all of the other joint owners. *Cheeks v. Herrington*, 523 So. 2d 1033 (Miss. 1988).

In view of the provisions of §§ 11-21-3, 93-3-1 and 93-3-3, § 89-1-29 did not preclude a wife, who held real property as joint tenant with husband from whom she was separated but not divorced, from maintaining an action to partition the property, notwithstanding that husband continued to reside on the property and claimed it as his homestead. *Trigg v. Trigg*, 498 So. 2d 334 (Miss. 1986).

A wife, who held real property as joint tenant with husband from whom she was separated but not divorced, could maintain an action to partition the property, notwithstanding that husband continued to reside on the property and claimed it as his homestead. *Trigg v. Trigg*, 498 So. 2d 334 (Miss. 1986).

A divorced husband had no right to partition of the former marital residence where the divorce decree had awarded to the wife the exclusive use and possession of the property involved while she remained unmarried. *Sartin v. Sartin*, 405 So. 2d 84 (Miss. 1981).

Where property is subject to partition during the lives of cotenants-husbands, the right to partition is not enjoined by the deaths of the cotenants-husbands and the survival of their wives; however, the widows should retain their houses as improvements on the land, if possible, or, in the alternative, if it is not feasible to partition the land to allow the widows to receive their respective houses as improvements, then an accounting should be had as to such improvements. *Carter v. Brewton*, 396 So. 2d 617 (Miss. 1981).

In a proceeding under § 11-21-3 for partition of certain real estate and farm lands owned by the petitioner and her former husband as joint tenants, with the

right of survivorship, the chancery court erred in dismissing the petition where the divorce decree made no attempt to grant to either party an estate for life or for years or any other estate or title in derogation or diminution of the title already vested in them respectively as joint tenants. The provision in the decree that the husband might farm a portion of the land was ineffectual to deprive the petitioner of her vested interest or to restrict the exercise of her rights with respect to the same; § 27-33-3, which provides for the exemption of homesteads from certain taxes, does not affect the right of a cotenant or tenant in common to partite property commonly or jointly owned. *Welborn v. Welborn*, 386 So. 2d 722 (Miss. 1980).

Where the former husband lost his right to occupy the marital home under a divorce decree giving the wife the right to exclusive use of the home, the husband lost his homestead rights under Code 1972 §§ 27-33-3 & 85-3-21, so that the husband thus held no homestead exemption on the property which could be used to defeat the former wife's right to partition under Code 1972 § 11-21-3; the existence of homestead rights in the former wife was irrelevant, since she waived them by bringing a suit for partition sale. *Blackmon v. Blackmon*, 350 So. 2d 44 (Miss. 1977).

This section [Code 1942, § 961] was inapplicable where a widow of a landowner, who had died intestate leaving also a son and daughter, neither waived nor attempted to dispose of her rights by deed conveying her one-third interest therein to her son, reserving to herself a life estate in all the lands. *Gresham v. Clark*, 231 Miss. 206, 95 So. 2d 234 (1957).

Decree confirming sale in partition of homestead land in which widow had a life estate should, on her objection, be vacated and cause dismissed. *Talley v. Talley*, 108 Miss. 84, 66 So. 328 (1914).

Incumbrance on land does not prevent partition. *Doran v. Beale*, 106 Miss. 305, 63 So. 647 (1913).

Children cannot have partition of exempt property of deceased father while occupied or used by widow, nor an accounting for the use. *Stevens v. Wilbourn*, 88 Miss. 514, 41 So. 66 (1906).

But the fact that dower has never been set apart will not wholly prevent partition; under a prayer for general relief the court will first set off the dower and then partition the balance of the tract. *Davis v. Patty*, 76 Miss. 753, 25 So. 662 (1899).

There can be no valid partition or sale of land for division of proceeds under this section [Code 1942, § 961] while there exists an outstanding unassigned dower interest in the same. *Gillelyen v. Martin*, 73 Miss. 695, 19 So. 482 (1896); *Ligon v. Spencer*, 58 Miss. 37 (1880); *Fox v. Coon*, 64 Miss. 465, 1 So. 629 (1887); *Wood v. Bryant*, 68 Miss. 198, 8 So. 518 (1891).

5. Jurisdiction and venue.

The court has jurisdiction in a suit to determine rights in the proceeds of property paid into the registry of the chancery court upon its purchase by the state, and to adjust the equities of the parties arising out of use and occupation, payment of taxes and cost of upkeep. *Moorer v. Willis*,

239 Miss. 118, 121 So. 2d 127 (1960).

The chancery court has no jurisdiction of a petition to sell land for partition of proceeds of sale as to land described in the petition, order of sale and notice of sale, in which the petitioners have no interest whatsoever, and are not therefore tenants in common with the adjoining owners as to the surplus lands sought to be sold with their own land. *Coers v. Williams*, 221 Miss. 706, 74 So. 2d 836 (1954).

Recital in decree that all parties interested in partition are made parties by proper process is conclusive of jurisdiction of court. *Sweatman v. Dean*, 86 Miss. 641, 38 So. 231 (1905).

In partition suits, the venue is determined alone by this section [Code 1942, § 961]. It is restrictive of the general statute on the subject of venue in chancery. This is true even if a sale be demanded. *Nugent & McWillie v. Powell*, 63 Miss. 99 (1885).

RESEARCH REFERENCES

ALR. Necessity and sufficiency of pleading in partition action to authorize incidental relief. 11 A.L.R.2d 1449.

Contractual provisions as affecting right to judicial partition. 37 A.L.R.3d 962.

Right to partition of overriding royalty interest in oil and gas leasehold. 58 A.L.R.3d 1052.

Lack of final settlement of intestate's estate as affecting heir's right to partition of realty. 92 A.L.R.3d 473.

Am Jur. 59 Am. Jur. 2d, Partition §§ 29 et seq.

CJS. 68 C.J.S., Partition §§ 64 et seq.

Law Reviews. 1981 Mississippi Supreme Court Review — Property. 52 Miss. L. J. 463, June 1982.

§ 11-21-5. Parties to proceedings for partition.

Any of the parties in interest, whether infants or adults, may institute proceedings for the partition of lands or for a partition sale thereof, by judgment of court as herein provided. All persons in interest must be made parties except (a) in cases where a part of the freehold is owned by persons owning a life estate therein or a life tenancy therein subject to the rights of remaindermen or reversioners, then, in such event, it shall only be necessary that the person or persons owning or claiming a life estate or life tenancy therein be made parties; and (b) in cases where the partition is for the surface of the land only, it shall not be necessary that persons owning divided or undivided interests in the minerals in the land be made parties unless such persons also have an interest in the surface of the land. An infant, or person of unsound mind, may sue by next friend as in other cases; but if the infant, or non compos mentis, have a guardian, the guardian must appear as next friend,

unless good cause to the contrary be shown. Where an infant or non compos is made a party defendant, the guardian, if any, of such infant or non compos shall also be made a party, whether the infant or non compos be resident or nonresident and whether the guardian be a resident or a nonresident; and the said guardian may appear and answer the complaint. The summons to the defendants, including the guardian aforesaid, shall be made pursuant to the Mississippi Rules of Civil Procedure. The word "guardian," where used in this section, shall be held to apply also to all persons who, under the laws of any other state or country, stand in that relation whether known as curator, tutor, committee or conservator, or by whatever other name or title such person may be known.

SOURCES: Codes, Hutchinson's 1848, ch. 42, art. 2 (1); 1857, ch. 36, art. 48; 1871, § 1814; 1880, §§ 2556, 2557; 1892, § 3098; Laws, 1906, § 3522; Hemingway's 1917, § 2834; Laws, 1930, § 2921; Laws, 1942, § 962; Laws, 1918, ch. 130; Laws, 1946, ch. 317, § 2; Laws, 1983, ch. 378, § 1; Laws, 1991, ch. 573, § 49, eff from and after July 1, 1991.

Editor's Note — Laws, 1983, ch. 378, § 2, effective from and after July 1, 1983, provides as follows:

"SECTION 2. Nothing contained in this act shall be construed to affect any decree relating to the partition of land entered prior to the effective date of this act."

Cross References — Procedural rules applicable to civil actions, see Miss. R. Civ. P. 1 et seq.

JUDICIAL DECISIONS

1. In general.
2. Executors or administrators.
3. Suing by next friend.

1. In general.

Where decedent died intestate, and the surviving children entered into an agreement effectively creating a life estate for one sibling who remained on the farm, the trial court properly (1) applied contract interpretation rules, (2) found that the intent of the agreement was not to limit restraint on alienation only to time of execution of contract, and (3) held that the agreement was not an unreasonable restraint on alienation; thus, plaintiff's partition action was dismissed. *Estate of Harris v. Harris*, 840 So. 2d 742 (Miss. Ct. App. 2003).

Former wife seeking judicial partition of property was denied partition action because she was unable to show her interest in property, where record title made husband sole grantee, deed naming wife as grantee contained erroneous description, and grantors in deed naming wife had no

interest in land at time of alleged quit claim deed, thus vesting no interest in wife; additionally, adverse possession was not shown. *Davis v. Davis*, 508 So. 2d 1062 (Miss. 1987).

In a suit to remove a cloud on title to land and for damages for slander of title, a defendant who had joined in a prayer for partition, and had consented to a partition decree, and who stated in open court that he was agreeable to the partition, was estopped to make any claim of title whatsoever to the lands involved in the partition. *Phelps v. Clinkscales*, 247 So. 2d 819 (Miss. 1971).

Prior to the 1946 amendment, partition was a possessory proceeding only, and the court could not adjudicate rights of owners of future interests. *Hemphill v. Mississippi State Hwy. Comm'n*, 245 Miss. 33, 145 So. 2d 455 (1962).

Owners of future interests are subject to partition if made parties defendant by persons having possessory estates; and unborn takers of future interests are reached by virtual representation.

Hemphill v. Mississippi State Hwy. Comm'n, 245 Miss. 33, 145 So. 2d 455 (1962).

Husband of tenant in common owning undivided interest in land occupied by them as homestead is neither a necessary or proper party to suit for partition of land, and there is no need for any service of process upon him before issuance of writ of assistance on behalf of purchaser of land. Dillon v. Hackett, 204 Miss. 464, 37 So. 2d 744 (1948).

The provisions in this section [Code 1942, § 962], requiring that all known living persons in interest be made parties, and the doctrine of virtual representation as to unborn contingent remaindermen constitute a workable plan which protects the constitutional rights of all parties and yet admits of present enjoyment and disposition of fee simple owners of property in common with others owning a lesser interest therein. Copeland v. West, 202 Miss. 106, 30 So. 2d 610 (1947).

The very purpose of the amendment to the statute (Laws 1946, chapter 317, § 2) was to require that known living contingent remaindermen be made parties to the proceeding. Copeland v. West, 202 Miss. 106, 30 So. 2d 610 (1947).

Contingent remaindermen are not bound by the proceedings unless made parties. Copeland v. West, 202 Miss. 106, 30 So. 2d 610 (1947).

Court should have refused to proceed under bill for partition where all necessary parties to complete final decree were not before him. Wilson v. Wilson, 166 Miss. 369, 146 So. 855 (1933).

Guardian ad litem of infant defendant in partition should not be made commissioner to make sale. Ponder v. Martin, 119 Miss. 156, 80 So. 388 (1919).

Instrument combining contract for services of attorney, power of attorney, and security for the fee for services in securing property for an heir, did not entitle attorney to bring suit for partition against heir. Wright v. Bowers, 112 Miss. 516, 73 So. 568 (1917).

Partition must be between joint-tenants, tenants in common or coparceners. White v. Lefoldt, 78 Miss. 173, 28 So. 818 (1900).

All persons interested in the property should be made parties to a partition suit.

Millsaps v. Shotwell, 76 Miss. 923, 25 So. 359 (1899).

The tenant in dower was held entitled to a partition of the land owned by her deceased husband in co-tenancy, to enable her to have her dower assigned in his part. Hill v. Gregory, 56 Miss. 341 (1879).

2. Executors or administrators.

Executor cannot sue to partition estate. Laughlin v. O'Reily, 92 Miss. 121, 45 So. 193 (1908).

Where executor made residuary devisee, and widow renounced will and took undivided one-half interest in land, they became tenants in common entitling executor to sue for partition. Laughlin v. O'Reily, 92 Miss. 121, 45 So. 193 (1908).

3. Suing by next friend.

A minor is not competent during minority to waive the requirement that he must sue by next friend. Prudential Ins. Co. v. Gleason, 185 Miss. 243, 187 So. 229 (1939).

There is no discretion in the court to dispense with the requirement that a minor must sue by next friend when it is expressly imposed by statute in the particular proceeding, and particularly so when the estate and interests of minors are so seriously concerned as in a partition of their real property. Prudential Ins. Co. v. Gleason, 185 Miss. 243, 187 So. 229 (1939).

A minor may not act as next friend to another minor. Prudential Ins. Co. v. Gleason, 185 Miss. 243, 187 So. 229 (1939).

A minor whose disability of minority has been specially removed to the extent of dealing with her own property could not act as next friend to other minors in an ex parte judicial partition of their real property. Prudential Ins. Co. v. Gleason, 185 Miss. 243, 187 So. 229 (1939).

Where the record in an ex parte judicial partition showed that minor parties therein were represented by a next friend who was also a minor, the decree therein was subject to collateral attack. Prudential Ins. Co. v. Gleason, 185 Miss. 243, 187 So. 229 (1939).

Fraud between next friend of minors in partition suit and commissioner appointed to make sale and purchaser at

sale is good cause for setting aside decree after minor comes of age; and any cause for setting aside decree between adults during term, and any cause calling for a reversal would amount to good cause for setting aside partition sale after infant comes of age. *Dendy v. Commercial Bank & Trust Co.*, 143 Miss. 56, 108 So. 274 (1926).

Grandfather who was next friend of plaintiff in partition suit, by purchasing the land at the commissioner's sale, ob-

tained a defective title apparent on the record and all parties claiming through him are chargeable with notice thereof. *Memphis Stone & Gravel Co. v. Archer*, 120 Miss. 453, 82 So. 315 (1919).

Duty of next friend is to protect rights of ward throughout partition suit and to prevent confirmation of sale if it violates or prejudices ward's rights. *Memphis Stone & Gravel Co. v. Archer*, 120 Miss. 453, 82 So. 315 (1919).

RESEARCH REFERENCES

ALR. Spouse of living co-owner as party to partition action. 57 A.L.R.2d 1166.

Partition action where United States or state owns undivided interest in property. 59 A.L.R.2d 937.

Am Jur. 51 Am. Jur. 2d, Life Tenants and Remaindermen §§ 14, 15, 106.

19 Am. Jur. Pl & Pr Forms (Rev), Partition, Form 1 (Petition or application by guardian of cotenant for order authorizing guardian's consent to proposed partition

of land by cotenants of ward).

19 Am. Jur. Pl & Pr Forms (Rev), Partition, Form 3 (Order for hearing on guardian's petition for leave to consent to partition of land and directing notice thereof).

19 Am. Jur. Pl & Pr Forms (Rev), Partition, Forms 41 et seq. Judicial partition of estates of decedents, minors, and incompetent persons.

CJS. 68 C.J.S., Partition §§ 72 et seq.

§ 11-21-7. Proceedings same as in other cases; when ex parte petitions may be heard.

Except as otherwise provided herein, the proceedings for partition shall be instituted and conducted as other suits in chancery; and all ex parte petitions may be heard and determined by the chancellor in term time or in vacation.

SOURCES: Codes, 1871, § 1815; 1880, § 2558; 1892, § 3099; Laws, 1906, § 3523; Hemingway's 1917, § 2835; Laws, 1930, § 2922; Laws, 1942, § 963; Laws, 1960, ch. 224.

Cross References — Procedural rules applicable to civil actions, see Miss. R. Civ. P. 1 et seq.

JUDICIAL DECISIONS

1. In general.

Defendant in partition proceeding cannot claim for partition without filing and serving pleading stating claim and requesting relief from cross-defendant, as well as from original plaintiff. *Johnson v. Franklin*, 481 So. 2d 812 (Miss. 1985).

Partition proceedings are conducted in accordance with Mississippi Rules of Civil Procedure. *Johnson v. Franklin*, 481 So. 2d 812 (Miss. 1985).

In suit for partition of real property, bill alleging complainant owns undivided interest in the property under a will sufficiently shows that he holds as tenant in common and that tenants in common are in possession, or have right of possession, and bill is sufficient in substance to support decree of partition, since Code 1942, § 1284, only requires bill to contain statement of facts on which complainant seeks relief in ordinary and concise language.

Dantone v. Dantone, 205 Miss. 420, 38 So. 2d 908 (1949).

The court has the power and duty in partition proceedings to adjudicate and adjust all the equities between the parties and to that end a cross bill is available when necessary, to be dealt with as in other suits in chancery. Prudential Ins. Co. v. Gleason, 185 Miss. 243, 187 So. 229 (1939).

Where the vendee of one of the parties to a judicial partition alleged and prayed in its cross bill to an action to declare such partition void because of the minority of

some of the parties thereto, that the partition was valid, or, if not, that the minors had ratified it by their subsequent partition of the remainder of the land in pais, or, if mistaken therein, the vendee, as assignee, was entitled to its vendor's undivided interest in the entire property and a partition thereof, and prayed for general relief, such allegations and prayer were sufficient to present and require action by the court as respects the vendee's alternate contention. Prudential Ins. Co. v. Gleason, 185 Miss. 243, 187 So. 229 (1939).

RESEARCH REFERENCES

ALR. Burden of proof in partition suit as regards alleged prior voluntary partition of property. 1 A.L.R.2d 473.

Necessity and sufficiency of pleading in partition action to authorize incidental relief. 11 A.L.R.2d 1449.

Am Jur. 59A Am. Jur. 2d, Partition §§ 57 et seq.

19 Am. Jur. Pl & Pr Forms (Rev), Partition, Forms 11 et seq. (Judicial partition of real property).

§ 11-21-9. Controverted title and all equities disposed of.

If the title of the plaintiffs seeking partition or sale of land for a division shall be controverted, it shall not be necessary for the court to dismiss the complaint, but the question of title shall be tried and determined in the suit and the court shall have power to determine all questions of title, and to remove all clouds upon the title, if any, of the lands whereof partition is sought and to apportion encumbrances, if partition be made of land encumbered and it be deemed proper to do so. The court may adjust the equities between and determine all claims of the several cotenants, as well as the equities and claims of encumbrancers.

SOURCES: Codes, 1871, § 1817; 1880, § 2576; 1892, § 3101; Laws, 1906, § 3525; Hemingway's 1917, § 2837; Laws, 1930, § 2923; Laws, 1942, § 964; Laws, 1991, ch. 573, § 50, eff from and after July 1, 1991.

Cross References — Power of the chancery courts to confirm and quiet titles, generally, see § 11-17-29.

Procedural rules applicable to civil actions, see Miss. R. Civ. P. 1 et seq.

JUDICIAL DECISIONS

1. Generally.
2. Rights of parties.

1. Generally.

Judicial estoppel precludes former wife from challenging former husband's title to real property jointly owned by them

where, in prior divorce litigation, wife swore that she and husband each owned one-half interest in property. Daughtrey v. Daughtrey, 474 So. 2d 598 (Miss. 1985).

In a suit by a cotenant, against a cotenant, for accounting of proceeds received upon sale of timber, where in a previous

partition suit the liability of cotenant to account was not adjudicated, although under the statute it could have been adjudicated, the decree in the partition suit was not *res judicata*. *Van Zandt v. Van Zandt*, 227 Miss. 528, 86 So. 2d 466 (1956).

The court has the power and duty in partition proceedings to adjudicate and adjust all the equities between the parties and to that end a cross bill is available when necessary, to be dealt with as in other suits in chancery. *Prudential Ins. Co. v. Gleason*, 185 Miss. 243, 187 So. 229 (1939).

Where chancery court confirmed commissioners' report partitioning land and ordered accounting of rents and improvements, subsequent money decree adjudicating equities between parties held "final decree," appeal from which brought up for review all preliminary and interlocutory decree, including decrees confirming report of commissioners on partition. *Butler v. Furr*, 168 Miss. 884, 152 So. 277 (1934).

Encumbrance on land will not prevent partition. *Doran v. Beale*, 106 Miss. 305, 63 So. 647 (1913).

It is proper for the court in partition to decide all equities arising from a payment of a lien and taxes and a claim for use and occupation by one of the co-tenants. *Walker v. Williams*, 84 Miss. 392, 36 So. 450 (1904).

Chancellor may determine complainant's title as against life tenant and remainderman and award partition against only life tenant. *Walker v. Williams*, 84 Miss. 392, 36 So. 450 (1904).

Under this section [Code 1942, § 964] the court has jurisdiction to adjudicate all conflicting claims or controversies between those properly joined as parties. This is true even where a defendant alleged to be a cotenant denies that he is such and asserts an adverse title in himself. *Claughton v. Claughton*, 70 Miss. 384, 12 So. 340 (1892); *Nugent & McWillie v. Powell*, 63 Miss. 99 (1885).

The statute does not extend to controversies other than between co-tenants. Strangers asserting adverse claims cannot be brought into the suit for partition and their titles canceled as clouds. *Nugent & McWillie v. Powell*, 63 Miss. 99 (1885); *Cooper v. Fox*, 67 Miss. 237, 7 So. 342 (1889).

2. Rights of parties.

Where the chancellor abused his discretion in attempting to fashion a unique remedy to sever a cotenancy by ignoring statutes of the state defining the only lawful method available to accomplish that purpose, the co-tenant seeking partition was entitled to one-half the sale proceeds increased by \$198 for various adjustments for such matters as repairs, improvements, taxes, and mortgage payments. *Murphree v. Cook*, 822 So. 2d 1092 (Miss. Ct. App. 2002).

Because the chancellor in a partition action elected to assess the tenant-in-possession with one-half the rent value of the property for her occupancy of the co-tenant's undivided one-half interest in it, the chancellor in effect called on the tenant-in-possession to pay for her exclusive use of the property; therefore, the co-tenant could not receive the full rent value of his half interest in the property while, at the same time, forcing the tenant-in-possession to pay the normal expenses of operating and maintaining the property. *Murphree v. Cook*, — So. 2d —, 2001 Miss. App. LEXIS 307 (Miss. Ct. App. July 31, 2001).

In partition proceedings it is admissible to seek an account for rents against cotenants in possession. *Jefcoat v. Powell*, 235 Miss. 291, 108 So. 2d 868 (1959).

Where vendee of one of the parties to a judicial partition alleged in its cross bill to an action to declare such partition void because of minority of some of the parties thereto, that the partition was valid, or, if not, that the minor parties thereto had ratified it by their subsequent partition of the remainder of the land in pais, or, if mistaken therein, the vendee, as assignee, was entitled to its vendor's undivided interest in the entire property and a partition thereof, and prayed for general relief, such allegations and prayer were sufficient to present and require action by the court as respects the alternate contention of the vendee. *Prudential Ins. Co. v. Gleason*, 185 Miss. 243, 187 So. 229 (1939).

In partition suit, purchaser from cotenant who bought common property at trustee's sale should be allowed sum received by co-tenant for timber and expended by

him in discharging encumbrances against common property. *Gilchrist Fordney Co. v. Ezelle*, 141 Miss. 124, 106 So. 269 (1925).

Jury trial in partition where complainant's title is denied by cross-bill is discretionary and not a right. *Bland v. Bland*, 105 Miss. 478, 62 So. 641 (1913).

The right of a tenant in common upon partition to charge the interest of his cotenant with what may be due on an accounting as to receipts and disburse-

ments concerning the common estate, does not entitle him to priority over a bona fide encumbrancer of the interest of such co-tenant. *Burns v. Dreyfus*, 69 Miss. 211, 11 So. 107 (1891); *Morgan v. Long*, 73 Miss. 406, 19 So. 98 (1895).

A defendant who has not entered under a common claim of title, can defeat a partition suit by showing an outstanding title in a stranger to the suit. *Cooper v. Fox*, 67 Miss. 237, 7 So. 342 (1889).

RESEARCH REFERENCES

Am Jur. 59 *Am. Jur. 2d*, Partition § 31.

CJS. 68 *C.J.S.*, Partition §§ 38-41.

§ 11-21-11. Court may order sale in first instance.

If, upon hearing, the court be of the opinion that a sale of the lands, or any part thereof, will better promote the interest of all parties than a partition in kind, or if the court be satisfied that an equal division cannot be made, it shall order a sale of the lands, or such part thereof as may be deemed proper, and a division of the proceeds among the cotenants according to their respective interests. The court may appoint a master to make the sale, and may make all proper orders to protect the rights of the parties interested. The court may order the sale of a part of the land and the partition in kind of the residue.

Before the court shall order a sale of the lands, the court may cause an appraisal to be made of the property, the expense of which shall be taxed and collected as costs in the proceedings. If the court causes an appraisal of the property to be made, then, subsequent to the receipt and filing of the appraisal with the court, the court shall hold in abeyance its order for sale of the land for a period of thirty (30) days in order to allow the parties the opportunity to reach an agreement as to a partition in kind or sale of the lands.

SOURCES: Codes, 1871, § 1829; 1880, § 2559; 1892, § 3100; Laws, 1906, § 3524; Hemingway's 1917, § 2836; Laws, 1930, § 2924; Laws, 1942, § 965; Laws, 1958, ch. 251; Laws, 1984, ch. 437, § 1; Laws, 1991, ch. 573, § 51, eff from and after July 1, 1991.

Cross References — Sale of land upon commissioner's report, see § 11-21-27.

Where a person entitled to a distributive share of a deceased's estate may compel distribution, see § 91-7-303.

Procedural rules applicable to civil actions, see Miss. R. Civ. P. 1 et seq.

JUDICIAL DECISIONS

1. Generally.
2. Construction.
3. Burden of proof.
4. Consent of parties.
5. Appointment of commissioner to make sale.

1. Generally.

Trial court properly ordered that commercial property be sold instead of partited in kind where property was not subject to partition in kind due to configuration of seven buildings thereon and by

virtue the parties' strained relationship after purchasing the property, but appellate court reemphasized a preference for partition in kind when practicable. *Fuller v. Chimento*, 824 So. 2d 599 (Miss. 2002).

Chancellor, who ordered a co-tenant to be divested of his interest in the property at a price calculated using such factors as the original cost, the subsequent expenses of maintaining and operating the property, and a fair rental factor based on the fact that one tenant was out of possession during the entire period of joint ownership, erred, since the right of partition created by statute is an absolute right of a tenant in common; thus, an attempt by a chancellor to fashion an alternate means of ending a cotenancy which he deemed more equitable under the particular facts was an error as a matter of law. The court however found no reversible error in the manner in which the chancellor computed the property values and adjusted the equities, so these could be used if the property were to be partitioned on remand. *Murphree v. Cook*, — So. 2d —, 2001 Miss. App. LEXIS 307 (Miss. Ct. App. July 31, 2001).

A chancellor erred in ordering a petition of property by sale, rather than the legally preferable partition in kind, where there was no substantial proof that a sale would better promote the interests of the parties or that an equal partition in kind would be impracticable. *Shaw v. Shaw*, 603 So. 2d 287 (Miss. 1992).

Tenant in common who filed answer to complaint for partition alleging affirmatively that property could not be divided in kind, but who failed to adhere to the prerequisites of Mississippi Code § 11-21-11, could not prevail on appeal where the record, which contained nothing to support his brief of errors, showed scrupulous adherence by the chancery court and chancellor in vacation to the law and partition statutes. *Vinson v. Johnson*, 493 So. 2d 947 (Miss. 1986).

A sale of land cannot be decreed unless it has been shown that an equal partition in kind cannot be made. *Monaghan v. Wagner*, 487 So. 2d 815 (Miss. 1986).

When house jointly owned by former husband and former wife is ordered sold, wife is not entitled to be allowed to pur-

chase land in question under affordable terms and conditions. *Daughtrey v. Daughtrey*, 474 So. 2d 598 (Miss. 1985).

Hardship is not defense to right of partition. *Daughtrey v. Daughtrey*, 474 So. 2d 598 (Miss. 1985).

Where there is nothing in the record to indicate that it would be to the best interest of all of the parties to sell the property rather than partition it in kind, the sale of the property should not be ordered. *Mathis v. Quick*, 271 So. 2d 924 (Miss. 1973).

In the absence of evidence that a sale will better promote the interests of the parties or an equal division in kind cannot be made, a sale should not be ordered. *Dailey v. Houston*, 246 Miss. 667, 151 So. 2d 919 (1963).

This section [Code 1942, § 965] affords authority for ordering partition in kind to a cotenant desirous thereof, providing owelty if necessary, and a sale of the remainder with division of the proceeds. *Carter v. Ford*, 241 Miss. 511, 130 So. 2d 852 (1961).

In determining whether sale and division of proceeds should be ordered instead of partition in kind, the cost of partition in kind, while a consideration, is not controlling. *Carter v. Ford*, 241 Miss. 511, 130 So. 2d 852 (1961).

In determining whether to order division in kind rather than a sale, the widow's election against the will does not warrant disregard of its provisions as to the shares of other beneficiaries. *Jefcoat v. Powell*, 235 Miss. 291, 108 So. 2d 868 (1959).

Before court can order sale of lands for division of proceeds of sale under this section [Code 1942, § 965], court must be of opinion that sale of the lands, or any part thereof, will better promote interest of all parties than partition in kind, or that equal division cannot be made. *Dantone v. Dantone*, 205 Miss. 420, 38 So. 2d 908 (1949).

Where a trustee under a trust in favor of an incompetent tenant in common was to expend as much of the income and as much of the principal as was necessary for the support and maintenance of the incompetent, and was empowered to sell the undivided interest of the incompetent during his lifetime, such trust did not provide

for a life estate only, so as to preclude a partition sale without the trustee's consent; and the other tenants in common were entitled to have the property sold in its entirety in view of demurrers admitting that the property was not subject to partition in kind. *Beard v. Rosenzweig*, 190 Miss. 325, 200 So. 261 (1941).

Sale for division of proceeds not ordered unless lands not susceptible of partition in kind. *Hilbun v. Hilbun*, 134 Miss. 235, 98 So. 593 (1924).

Sale of land for partition ordered only where it will better promote interest of parties, or where division in kind cannot be made. *Smith v. Stansel*, 93 Miss. 69, 46 So. 538 (1908).

Where the terms of a decree directing a sale in partition were not complied with, and the purchase-money was not paid, and the note for the deferred payments was not given, and no commissioner's deed was executed in pursuance of the sale, the sale was void and passed no title out of the owners. *Liverman v. Lee*, 86 Miss. 370, 38 So. 658 (1905).

Where a bidder at a void sale, under a decree for partition, made a payment to the owners or satisfied a tax lien on the land, he should be repaid out of the proceeds of a sale under a decree in a subsequent suit for partition. *Liverman v. Lee*, 86 Miss. 370, 38 So. 658 (1905).

A decree directing partition of land is interlocutory and may be modified or vacated by the court at any time before the final decree, the one confirming the partition, is rendered. *Sweatman v. Dean*, 86 Miss. 641, 38 So. 231 (1905).

Title in the purchaser under a chancery proceeding for the sale of lands for a partition of proceeds, which cannot be collaterally attacked, is shown as against the parties to the suit by offering in evidence the bill for partition, process issued and served in the cause, with decree and report of sale and decree of confirmation of sale. *Sweatman v. Dean*, 86 Miss. 641, 38 So. 231 (1905).

A decree for the sale of lands for division of the proceeds among tenants in common is void after rendition upon proof of publication only, without the precedent affidavit required by statute to authorize such service of process. *Moore v. Summerville*,

80 Miss. 323, 31 So. 793 (1902), reh'g denied, 80 Miss. 323, 32 So. 294 (1902).

A sale should not be decreed in partition unless the petition alleges, or the proof shows the existence of one of the statutory requisites therefor. *Tindall v. Tindall*, 3 So. 581 (Miss. 1888).

A sale will not be ordered where the parties are not entitled to a partition in kind. *Pankey v. Howard*, 47 Miss. 83 (1872).

2. Construction.

The statute providing for the sale of land for division of proceeds among tenants in common is an innovation on the common law and must be strictly pursued. *Cox v. Kyle*, 75 Miss. 667, 23 So. 518 (1898).

3. Burden of proof.

Tenant in common seeking a partition by sale has the burden of proving his case comes under the prerequisite statutory provision for ordering a sale as opposed to division in kind. *Vinson v. Johnson*, 493 So. 2d 947 (Miss. 1986).

The trial court erred in finding that a 170-acre tract of timber land was not subject to partition in kind and in ordering its sale where, of the eight heirs-at-law, only one favored the sale, and where such heir did not put on any evidence as to why the property could not be divided or why the interests of all the parties would be better met by a sale; while it was true that the court-appointed commissioners had concluded that the land was not susceptible to division in kind, they failed to give any substantial reasons, based upon a recital of facts found by them to exist, why it could not be done, and the facts recited fell far short of showing that the best interests of all parties would best be served by sale. Nor was the cost of partition in kind controlling, even though the commissioners reported that it would necessitate nine or more surveys at approximately \$300 per survey, as well as nine or more appraisals at an approximate cost of \$200 to \$500 per parcel. *Bailey v. Vaughn*, 375 So. 2d 1054 (Miss. 1979).

Plaintiffs seeking a partition failed to carry their burden of proving clearly that a division could not be made in kind, where defendants owned four ninths in-

terest and were willing to accept their land as a unit. *Burley v. Kuykendall*, 349 So. 2d 1036 (Miss. 1977).

One seeking partition by sale must bring his case clearly within the statute. *Dailey v. Houston*, 246 Miss. 667, 151 So. 2d 919 (1963).

Joint owner seeking partition of realty by sale of premises has burden to establish that lands were not susceptible of partition in kind. *Hilbun v. Hilbun*, 134 Miss. 235, 98 So. 593 (1924); *Hogue v. Armstrong*, 159 Miss. 875, 132 So. 446 (1931).

4. Consent of parties.

The court properly ordered a partition by sale where all of the parties agreed to a sale of the property and the consent order specifically stated that the property was not capable of partition in kind in a fair and equitable manner for various enumerated reasons. *Dunn v. BL Dev. Corp.*, 747 So. 2d 284 (Miss. Ct. App. 1999).

A partition by sale is improperly ordered over the objection of one owning 69% of one parcel and 84 ½ % of the other. *Dailey v. Houston*, 246 Miss. 667, 151 So. 2d 919 (1963).

Court has no authority to order sale over co-tenant's protest unless it is clear that division in kind cannot be made, or sale would promote best interests of all parties. *Shorter v. Lesser*, 98 Miss. 706, 54 So. 155 (1911).

A decree ordering the sale of property owned in common for division of the proceeds cannot rightfully direct the sale of other property owned exclusively by one of the parties without the consent of all the parties. *White v. Lefoldt*, 78 Miss. 173, 28 So. 818 (1900).

5. Appointment of commissioner to make sale.

Guardian ad litem in partition suit should not be made commissioner to make sale. *Ponder v. Martin*, 119 Miss. 156, 80 So. 388 (1919).

A decree directing a partition of land if it can be equitably done, and, if not, that the commissioners appointed to make the sale shall report accordingly to the next term of court, is not a final decree, but an interlocutory decree from which no appeal lies. *Gilleylen v. Martin*, 73 Miss. 695, 19 So. 482 (1896).

RESEARCH REFERENCES

Am Jur. 59 Am. Jur. 2d, Partition §§ 100 et seq.

19 Am. Jur. Pl and Pr Forms (Rev), Partition, Forms 181 et seq. (Interlocutory judgments and orders for sale in partition).

CJS. 68 C.J.S., Partition §§ 149 et seq.

Law Reviews. 1984 Mississippi Supreme Court Review: Property. 55 Miss. L. J. 135, March, 1985.

§ 11-21-13. Partition without masters; owelty.

If, at the hearing, it appear that the intervention of masters is unnecessary to secure an equal partition in kind, or that the same can be effected by providing owelty, and that it would best promote the interest of the parties, the court may order the partition and fix the amount to be paid by one (1) or several cotenants to another or others; or this may be done on hearing the report of the master.

SOURCES: Codes, 1892, § 3102; Laws, 1906, § 3526; Hemingway's 1917, § 2838; Laws, 1930, § 2925; Laws, 1942, § 966; Laws, 1958, ch. 252; Laws, 1991, ch. 573, § 52, eff from and after July 1, 1991.

Cross References — Procedural rules applicable to civil actions, see Miss. R. Civ. P. 1 et seq.

JUDICIAL DECISIONS

1. In general.

The court in its discretion may order a sale of only a part of the lands sought to be partitioned. *Dailey v. Houston*, 246 Miss. 667, 151 So. 2d 919 (1963).

Where tenants in common, holding unequal undivided interests, went into separate possession of respective shares in 1918 under alleged oral partition, and improved land, chancery court, in partition suit in 1928, held required to make effort to allot improved lands to their improvers, without accounting, but, if that was impractical and new partition

was necessary, accounting should be had as to such improvements. *Butler v. Furr*, 168 Miss. 884, 152 So. 277 (1934).

Where tenants in common, holding unequal undivided interests, went into exclusive and separate possession of respective shares under alleged oral partition in 1918, and one cultivated land in business-like manner, while others neglected theirs, they were estopped, in partition suit in 1928, to claim rent from one another, and no accounting for rents was due. *Butler v. Furr*, 168 Miss. 884, 152 So. 277 (1934).

RESEARCH REFERENCES

Am Jur. 59 Am. Jur. 2d, Partition §§ 52 et seq.

CJS. 68 C.J.S., Partition § 122.

§ 11-21-15. Judgment appointing masters.

If the judgment be for a partition of the land, it shall state the number of shares into which the land is to be divided, and shall appoint three (3) discreet freeholders, not related to the parties by consanguinity or affinity, to make partition according to the judgment. Either party may object to any master for cause, and, in case the objection be sustained, the place shall be filled by another appointment. If any vacancy occur among the masters, the chancellor may fill such vacancy at any time by written appointment.

SOURCES: Codes, *Hutchinson's* 1848, ch. 42, art. 2 (2); 1857, ch. 36, art. 51; 1871, § 1819; 1880, §§ 2560, 2561; 1892, § 3103; *Laws*, 1906, § 3327; *Hemingway's* 1917, § 2839; *Laws*, 1930, § 2926; *Laws*, 1942, § 967; *Laws*, 1958, ch. 259; *Laws*, 1991, ch. 573, § 53, eff from and after July 1, 1991.

Cross References — Procedural rules applicable to civil actions, see *Miss. R. Civ. P.* 1 et seq.

RESEARCH REFERENCES

Am Jur. 59 Am. Jur. 2d, Partition §§ 92, 93, 96.
19 Am. Jur. Pl & Pr Forms (Rev), Par-

tition, Form 112 (Order appointing commissioners or referees to partition land).
CJS. 68 C.J.S., Partition § 129.

§ 11-21-17. Oath of special commissioners.

Before the special commissioners enter upon the discharge of their duties, they shall take and subscribe an oath before some competent officer, that they will honestly, faithfully and impartially make the partition decreed, and

perform the duties required of them to the best of their skill, knowledge and judgment.

SOURCES: Codes, *Hutchinson's* 1848, ch. 42, art. 2 (3); 1857, ch. 36, art. 52; 1871, § 1822; 1880, § 2562; 1892, § 3104; Laws, 1906, § 3528; *Hemingway's* 1917, § 2840; Laws, 1930, § 2927; Laws, 1942, § 968; Laws, 1958, ch. 258.

Cross References — Procedural rules applicable to civil actions, see Miss. R. Civ. P. 1 et seq.

RESEARCH REFERENCES

Am Jur. 59 Am. Jur. 2d, Partition § 92.

CJS. 68 C.J.S., Partition § 129.

§ 11-21-19. Survey made and division into shares.

The special commissioners shall, if deemed advisable, cause a survey to be made of the lands to be divided, in their presence, and shall divide the same into the number of parts or shares directed in the order containing their appointment, each part or share to contain one or more lots, as the special commissioners may think proper, having regard to the situation, quantity, quality and advantages of each part or share, so that they may be equal in value as nearly as may be, or according to the respective rights of the parties. If the bounds or title of any tract be controverted and the controverted part be valuable, the special commissioners shall separate it from the part not controverted, and make a partition of the tract or tracts in such manner that a portion of the controverted part may be allotted to each share, as well as a portion of the part not controverted. The special commissioners, or any one of them, previous to the survey, if any, shall administer an oath to the surveyors and chain bearers that they will honestly and impartially perform their respective duties.

SOURCES: Codes, *Hutchinson's* 1848, ch. 42, art. 2 (4); 1857, ch. 36, art. 53; 1871, § 1823; 1880, § 2563; 1892, § 3105; Laws, 1906, § 3529; *Hemingway's* 1917, § 2841; Laws, 1930, § 2928; Laws, 1942, § 969; Laws, 1958, ch. 249.

Cross References — Procedural rules applicable to civil actions, see Miss. R. Civ. P. 1 et seq.

RESEARCH REFERENCES

ALR. Necessary and proper parties to suit or proceeding to establish private boundary line. 73 A.L.R.3d 948.

§ 11-21-21. Allotment of shares by ballot.

The special commissioners, if the same have not been done by the surveyor, shall make a plat of land to be divided; shall make true field notes, specifying the metes and bounds of the several shares, and of each parcel of each share which contains more than one parcel; and the several shares and

parcels of shares shall be distinctly designated on the plat and numbered from one progressively, and the same number shall designate the several parcels of one share; and they shall allot the several shares in the following manner: The special commissioners shall publicly number as many tickets as there are shares marked on the plat, and put the tickets into a hat or box, and the names of the persons entitled to shares shall be written on separate tickets and put into another hat or box, when a person appointed for that purpose by the special commissioners shall proceed to draw a ticket of those containing the names, and then a ticket of the numbers, and so proceed until the whole are drawn; and the number which shall be drawn to the name of any cotenant shall be his separate share in the land so divided. The special commissioners shall make certificate of the balloting, signed by them, specifying the time, place and manner thereof, and the allotment of shares.

SOURCES: Codes, Hutchinson's 1848, ch. 42, art. 2(6); 1857, ch. 36, art. 54; 1871, § 1824; 1880, § 2534; 1892, § 3106; Laws, 1906, § 3530; Hemingway's 1917, § 2842; Laws, 1930, § 2929; Laws, 1942, § 970; Laws, 1958, ch. 250.

Cross References — Procedural rules applicable to civil actions, see Miss. R. Civ. P. 1 et seq.

JUDICIAL DECISIONS

1. In general.

Where one cotenant had cleared land amounting to his share and remainder was wild land, cleared land should be allotted to him. *Bennett v. Bennett*, 84 Miss. 493, 36 So. 452 (1904).

RESEARCH REFERENCES

ALR. Judicial partition of land by lot or chance. 32 A.L.R.4th 909.

§ 11-21-23. Assignment of shares and owelty.

Instead of making an allotment of shares by ballot, the special commissioners may assign shares to the parties entitled, if so directed by the court or chancellor, or if they find it desirable, and in any case, if an equal partition in kind cannot be made otherwise, or so advantageously, the special commissioners may assess the amount of money to be paid by one or more of the cotenants to another or others, so as to equalize their respective shares.

SOURCES: Codes, 1871, § 2567; 1880, § 2564; 1892, § 3107; Laws, 1906, § 3531; Hemingway's 1917, § 2843; Laws, 1930, § 2930; Laws, 1942, § 971; Laws, 1958, ch. 244.

Cross References — Procedural rules applicable to civil actions, see Miss. R. Civ. P. 1 et seq.

JUDICIAL DECISIONS

1. In general.

Where tenants in common, holding unequal undivided interests, went into exclusive and separate possession of respective shares under alleged oral partition in 1918, and one cultivated land in business-like manner, while others neglected theirs, they were estopped, in partition suit in 1928, to claim rents from one another, and no accounting for rents was due. *Butler v. Furr*, 168 Miss. 884, 152 So. 277 (1934).

Where tenants in common, holding unequal undivided interests, went into separate possession of respective shares in 1918 under alleged oral partition, and improved land, chancery court, in partition suit in 1928, held required to make effort to allot improved lands to their improvers, without accounting, but, if that was impractical and new partition was necessary, accounting should be had as to such improvements. *Butler v. Furr*, 168 Miss. 884, 152 So. 277 (1934).

RESEARCH REFERENCES

Am Jur. 59 Am. Jur. 2d, Partition § 95.

CJS. 68 C.J.S., Partition §§ 132-135.

§ 11-21-25. Report of special commissioners.

The special commissioners shall make to the court, at the first term held after they have acted, or else as the court shall direct, a full report, in writing, of their proceedings, which, on exceptions filed at any time before its confirmation, for good cause shown may be set aside by the court, and other special commissioners appointed, or the same special commissioners may be directed to make a new partition; or the partition may be modified by the court in any particular, and be confirmed as thus modified.

SOURCES: Codes, *Hutchinson's* 1848, ch. 42, art. 2(8); 1857, ch. 36, art. 55; 1871, § 1825; 1880, § 2565; 1892, § 3108; Laws, 1906, § 3532; *Hemingway's* 1917, § 2844; Laws, 1930, § 2931; Laws, 1942, § 972; Laws, 1958, ch. 254.

Cross References — Procedural rules applicable to civil actions, see Miss. R. Civ. P. 1 et seq.

JUDICIAL DECISIONS

1. In general.

Where chancery court confirmed commissioners' report partitioning land and ordered accounting of rents and improvements, subsequent money decree adjudicating equities between parties held "final

decree," appeal from which brought up for review all preliminary and interlocutory decrees, including decree confirming report of commissioners on partition. *Butler v. Furr*, 168 Miss. 884, 152 So. 277 (1934).

RESEARCH REFERENCES

Am Jur. 59 Am. Jur. 2d, Partition § 96.

19 Am. Jur. Pl & Pr Forms (Rev), Partition, Forms 123-127 (Report by commissioners or referees).

CJS. 68 C.J.S., Partition §§ 136-139.

§ 11-21-27. Land sold when not capable of division.

If, after a judgment for partition and the appointment of masters, it shall appear from the report of the masters, or on exceptions to their report, that a just and equal division of the land cannot be made, or that a sale will better promote the interest of all the cotenants, the court shall order a sale of the land, or such part thereof as may be deemed proper, and a division of the proceeds among those interested, as provided for.

Before the court shall order a sale of the lands, the court may cause an appraisal to be made of the property, the expense of which shall be taxed and collected as costs in the proceedings. If the court causes an appraisal of the property to be made, then, subsequent to the receipt and filing of the appraisal with the court, the court shall hold in abeyance its order for sale of the land for a period of thirty (30) days in order to allow the parties the opportunity to reach an agreement as to a partition in kind or sale of the lands.

SOURCES: Codes, 1857, ch. 36, art. 59; 1871, § 1829; 1880, § 2566; 1892, § 3111; Laws, 1906, § 3535; Hemingway's 1917, § 2847; Laws, 1930, § 2932; Laws, 1942, § 973; Laws, 1958, ch. 246; Laws, 1984, ch. 437, § 2; Laws, 1991, ch. 573, § 54, eff from and after July 1, 1991.

Cross References — Discretion of court to order the sale of land where this will best serve the interests of the parties, see § 11-21-11.

How sale of property shall be made when ordered by a justice of the peace, see § 11-21-79.

Procedural rules applicable to civil actions, see Miss. R. Civ. P. 1 et seq.

RESEARCH REFERENCES

<p>Am Jur. 59 Am. Jur. 2d, Partition §§ 100 et seq. 19 Am. Jur. Pl & Pr Forms (Rev), Partition, Form 129 (Writ to sheriff for sale of</p>	<p>property after report that partition in kind is impracticable). CJS. 68 C.J.S., Partition §§ 149 et seq.</p>
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§ 11-21-29. Compensation of masters.

The court in which the cause is pending, or the chancellor or judge thereof in vacation, shall fix and allow reasonable compensation for each of the masters, and such compensation shall be taxed and collected as costs in the suit.

SOURCES: Codes, Hutchinson's 1848, ch. 42, art. 2(9); 1857, ch. 36, art. 57; 1871, § 1840; 1880, § 2575; 1892, § 3109; Laws, 1906, § 3533; Hemingway's 1917, § 2845; Laws, 1930, § 2933; Laws, 1942, § 974; Laws, 1928, ch. 299; Laws, 1960, ch. 225; Laws, 1991, ch. 573, § 55, eff from and after July 1, 1991.

Cross References — Procedural rules applicable to civil actions, see Miss. R. Civ. P. 1 et seq.

§ 11-21-31. Attorney's fees.

In all cases of the partition or sale of property for division of proceeds, the court may allow a reasonable attorney's fee to the attorney or the plaintiff, to

be taxed as a common charge on all the interests, and to be paid out of the proceeds in case of a sale, and to be a lien on the several parts in case of partition.

SOURCES: Codes, 1880, § 2577; 1892, § 3119; Laws, 1906, § 3542; Hemingway's 1917, § 2854; Laws, 1930, § 2934; Laws, 1942, § 975; Laws, 1991, ch. 573, § 56, eff from and after July 1, 1991.

Cross References — Procedural rules applicable to civil actions, see Miss. R. Civ. P. 1 et seq.

JUDICIAL DECISIONS

1. Effect of controversy between parties.
2. Allowance to defendant's solicitor.
3. Miscellaneous.

1. Effect of controversy between parties.

Although the trial judge in a partition suit has the authority to award attorney's fees to the attorney or to the complainant to be taxed as a common charge on all interests, pursuant to § 11-21-31, such authority is usually not allowed when the partition suit is resisted and the defendant employs an attorney in good faith to represent his or her interest. *O'Neill v. O'Neill*, 551 So. 2d 228 (Miss. 1989).

This section is intended primarily to allow a fee to the solicitor who conducts a partition suit without resistance, and it should not be allowed if the party opposing partition has presented a real defense, nor should attorney's fees be awarded until partition in kind or sale for division of proceeds has been completed and approved by the court; this section is discretionary and not mandatory. *Blackmon v. Blackmon*, 350 So. 2d 44 (Miss. 1977).

This statute relates to the allowance of a fee to the solicitor in an uncontested suit; and such fee should not be allowed where there is a real controversy and it is proper that defendants be represented by counsel of their own choosing—especially so where a defendant is successful in part. *Dailey v. Houston*, 246 Miss. 667, 151 So. 2d 919 (1963).

Where defendant was successful in part through his initiative and effort of his counsel, in securing relief asked in his answer, it was error to charge him with any part of fee of complainant's attorney. *Billingsley v. Billingsley*, 114 Miss. 702, 75 So. 547 (1917).

Thus, where defendants assert a hostile title to a part of the land it is error as against them to allow a fee which includes services in cancelling such claim, as well as services in the partition. *Neblett v. Neblett*, 70 Miss. 572, 12 So. 598 (1893); *Hoffman v. Smith*, 61 Miss. 544 (1883).

Primarily the statute is intended to give a fee to the solicitor who conducts the suit without resistance, but it is not so limited. *Hoffman v. Smith*, 61 Miss. 544 (1883).

When there is a real controversy, and a propriety in defendants being represented by counsel of their own, the fee should not be allowed. *Hoffman v. Smith*, 61 Miss. 544 (1883); *Walker v. Williams*, 84 Miss. 392, 36 So. 450 (1904); *Hardy v. Richards*, 103 Miss. 548, 60 So. 643 (1912); *Carpenter v. Carpenter*, 104 Miss. 403, 61 So. 421 (1913); *Brower v. Rosenbaum & Little*, 125 Miss. 87, 87 So. 130 (1921).

2. Allowance to defendant's solicitor.

Where a defendant employs his own attorney in good faith to represent his interest or to assert his position in a controversy during a partition proceeding, he should not be required to contribute to the fee of complainants' attorney. *Walker v. Davis*, 309 So. 2d 853 (Miss. 1975).

This section [Code 1942, § 975] does not warrant allowance of more than one fee. *Smith v. Stansel*, 93 Miss. 69, 46 So. 538 (1908).

The section [Code 1942, § 975] does not allow a fee to the solicitor of defendant who has filed an answer and cross-bill opposing a sale, and demanding partition in kind. *Potts v. Gray*, 60 Miss. 57 (1882).

3. Miscellaneous.

The intent of the legislature as expressed in this section [Code 1942, § 975]

was to give the court the option, in its discretion, of allowing a reasonable solicitor's fee to the solicitor for the complainant only after a partition in kind had been completed, or a sale of the property for division of the proceeds had been consummated, for the benefit of all the owners, and that only then could the court allow a fee and tax it as a common charge on all the interests. *Herrington v. Dennis*, 204 So. 2d 440 (Miss. 1967).

One of the most important duties and responsibilities devolving upon the solicitor for the complainant in a partition suit is to see that summons for nonresident defendants are legally correct and complete. *Herrington v. Dennis*, 204 So. 2d 440 (Miss. 1967).

Where the only services performed by the solicitor for the complainant was to initiate the action for a partition (which complainant later desired to dismiss), he was not entitled to intervene in the partition suit for the purpose of having the court determine a reasonable fee for his

services, nor was he entitled to a lien on the property to be partitioned, or upon the undivided interest therein of his client. *Herrington v. Dennis*, 204 So. 2d 440 (Miss. 1967).

Instrument combining contract for services of attorney, power of attorney, and security for fee in securing property for heir did not entitle attorney to bring partition suit against heir. *Wright v. Bowers*, 112 Miss. 516, 73 So. 568 (1917).

Decree erroneously making fee of complainant's solicitor common charge on all the land will not be reversed as to defendant appealing where she previously signed agreement that decree might be carried into effect, nor as to defendant not appealing. *Carpenter v. Carpenter*, 104 Miss. 403, 61 So. 421 (1913).

Where the sale is void complainants are not entitled to credit for attorney's fees and court costs, payable out of the proceeds of a valid sale in a subsequent suit. *Liverman v. Lee*, 86 Miss. 370, 38 So. 658 (1905).

RESEARCH REFERENCES

ALR. Allowance and apportionment of counsel fees in suit for partition. 94 A.L.R.2d 575.

Am Jur. 59 Am. Jur. 2d, Partition §§ 113 et seq.

CJS. 68 C.J.S., Partition §§ 207 et seq.

§ 11-21-33. Ovelty a lien.

In all cases where ovelty is allowed, it shall be a lien upon the share of the party charged therewith, which shall be superior to all other liens made or suffered by such party.

SOURCES: Codes, 1880, § 2567; 1892, § 3110; Laws, 1906, § 3534; Hemingway's 1917, § 2846; Laws, 1930, § 2935; Laws, 1942, § 976.

Cross References — Rule that lien created by cotenant shall remain in effect only as to that cotenant's share after partition, see § 11-21-39.

When property is not exempt from execution, see § 85-3-47.

Concurrence of liens for erecting, altering, or repairing the same structure, see § 85-7-263.

Preference given to mortgage for purchase-money of land, see § 89-1-45.

Procedural rules applicable to civil actions, see Miss. R. Civ. P. 1 et seq.

JUDICIAL DECISIONS

1. In general.

Because the chancellor in partition action elected to assess the tenant-in-pos-

session with one-half the rent value of the property for her occupancy of the cotenant's undivided one-half interest in the

property, the chancellor in effect called on the tenant-in-possession to pay for her exclusive use of the property; therefore, the co-tenant could not receive the full rent value of his half interest in the property while, at the same time, forcing the tenant-in-possession to pay the normal expenses of operating and maintaining

the property. Accordingly, in a partition in kind, the portion set apart to the tenant-in-possession could be subjected to a charge in the nature of owelty to secure the payment resulting from the adjustments. *Murphree v. Cook*, — So. 2d —, 2001 Miss. App. LEXIS 307 (Miss. Ct. App. July 31, 2001).

§ 11-21-35. Final judgment and judgment confirming partition.

The final judgment of the chancery court in partition proceedings shall ascertain and settle the rights of all parties; and it, and the judgment confirming the partition, shall constitute an instrument of evidence in all questions as to the title of the lands which may be the subject of the judgment, in all courts, and shall be conclusive as to the rights of all parties to the suit, and subject to motions and other post trial review, as in other suits, and to a repartition as provided.

SOURCES: Codes, 1871, § 1828; 1880, § 2568; 1892, § 3112; Laws, 1906, § 3536; Hemingway's 1917, § 2848; Laws, 1930, § 2936; Laws, 1942, § 977; Laws, 1991, ch. 573, § 57, eff from and after July 1, 1991.

Cross References — Rule that a decree of chancery court shall have effect of judgment in circuit court, see § 11-5-79.

Reports to chancellor of sale or partition of land, see § 11-5-107.

Procedural rules applicable to civil actions, see Miss. R. Civ. P. 1 et seq.

JUDICIAL DECISIONS

1. In general. *
2. Conclusiveness and validity.
3. Bill of review.

1. In general.

In a suit to set aside a final decree confirming a sale of land by a special commissioner for division of proceeds in a partition suit, the trial court erred in sustaining both a special demurrer raising the affirmative defenses of limitations of actions, laches and bona fide purchaser for value, and a motion to dismiss raising the affirmative defenses of *res judicata*, laches and estoppel, where none of the facts upon which the special demurrer and motion to dismiss could dependably rest had been averred in the complaint. Complainants' affirmative allegations that one or more of them had been in possession since the sale and that none of them had accepted the proceeds of the partition sale also raised a question of fact

to be determined upon proof. *Mosby v. Gandy*, 375 So. 2d 1024 (Miss. 1979).

Where the record in a partition suit wholly failed to show that the property sold for a grossly inadequate price, and there was no proof that the trial court did not permit appellant's testimony to be presented at the time of the final report of the special commissioner, the trial court's decree of partition was affirmed. *Legg v. Legg*, 251 Miss. 12, 168 So. 2d 58 (1964).

Bill which is sufficient in substance and contains prayer for general relief in addition to special prayer that property be sold for partition is sufficient to support decree for partition in kind. *Dantone v. Dantone*, 205 Miss. 420, 38 So. 2d 908 (1949).

The repartition mentioned in this statute is that provided by Code 1942, § 982, which is limited to one year next after the first partition. *Kittrell v. O'Flynn*, 203 Miss. 164, 33 So. 2d 628 (1948).

Duty of next friend to protect rights of ward throughout partition suit and to prevent confirmation if sale violates or prejudices rights of ward. *Memphis Stone & Gravel Co. v. Archer*, 120 Miss. 453, 82 So. 315 (1919).

Defective bond to prevent confirmation cured by Code 1906, § 1022. *Little v. Cammack*, 109 Miss. 753, 69 So. 594 (1915).

Damages to first purchaser not adjudicated in proceeding to prevent confirmation and for resale. *Little v. Cammack*, 109 Miss. 753, 69 So. 594 (1915).

On dismissing intervening petition against confirmation, petitioner not being party, it was error to confirm sale and adjudicate her rights. *Talley v. Talley*, 108 Miss. 84, 66 So. 328 (1914).

Price paid at partition sale does not belong to tenants in common until sale confirmed. *Bank of Hickory v. McPherson*, 102 Miss. 852, 59 So. 934 (1912) but see *Collier v. Trustmark Nat'l Bank*, 678 So. 2d 693 (Miss. 1996).

In suit for partition and accounting, resale of tenant's share proper where he failed to pay rent found to be collected by him. *George v. Woods*, 94 Miss. 268, 49 So. 147 (1909).

Defendants in partition suit may assert title to proceeds of interest awarded co-defendant against his garnishing creditor. *Schuler v. Murphy*, 91 Miss. 518, 44 So. 810, 124 Am. St. R. 708 (1907).

Where allowance for rent is excessive case will be reversed. *Bowles v. Wood*, 90 Miss. 742, 44 So. 169 (1907).

Where defendants seek to have a cause treated as a pending one because of an erroneous description of land in what had been regarded for years as a final decree in a partition suit and the complainant asks that if it be so treated the cause be dismissed, the defendants cannot complain of a decree dismissing it without prejudice to their right to bring any other suit they may see proper. *Farmer v. Allen*, 85 Miss. 672, 38 So. 38 (1905).

2. Conclusiveness and validity.

Where chancery court confirmed commissioners' report partitioning land and ordered accounting of rents, etc., subsequent money decree adjudicating equities between parties, held "final decree." *But-*

ler v. Furr, 168 Miss. 884, 152 So. 277 (1934).

A decree confirming an amicable partition of land is invalid which ignores the rights of a joint owner who was a defendant to the partition proceeding and did not assent to the allotment agreed upon by the other parties. *Cotton v. Cash*, 85 Miss. 29, 37 So. 459 (1904).

A decree for the sale of land for partition which fixes the interest of the parties is conclusive as to such interest as between the parties and their privies, although the decree is never executed by a valid sale of the land. *Alsobrook v. Eggleston*, 69 Miss. 833, 13 So. 850 (1892).

3. Bill of review.

A bill of review is the proper way to attack a partition deed to one who was the next friend of infant parties. *Welch v. Parker*, 242 Miss. 331, 135 So. 2d 851 (1961).

Review of a decree is barred by limitations where not sought within two years after the person seeking review reached majority. *Welch v. Parker*, 242 Miss. 331, 135 So. 2d 851 (1961).

No leave of court is necessary to file a bill of review for error apparent on face of record. *Dillon v. Hackett*, 204 Miss. 464, 37 So. 2d 744 (1948).

Petition for leave to file bill of review based upon newly discovered evidence must show by facts that no want of reasonable diligence in discovering evidence is to be imputed to petitioner and all inferences of want of diligence must be rebutted by complete statement of facts in that regard. *Dillon v. Hackett*, 204 Miss. 464, 37 So. 2d 744 (1948).

Demurrer to petition for leave to file bill of review based upon newly discovered evidence is correctly sustained when alleged newly discovered evidence was known to court at time decree complained of was executed and was incorporated into provisions of that decree. *Dillon v. Hackett*, 204 Miss. 464, 37 So. 2d 744 (1948).

A bill in equity seeking to review the proceedings and decrees in a partition suit should set forth the interests of all the parties, join all the parties to the original suit or show the facts justifying their nonjoinder; and show the facts justifying the joinder of persons not parties to the

original suit if any be joined. *Barber v. Armistead*, 82 Miss. 788, 35 So. 199 (1903).

Code 1892, § 3122, denying an action to recover property sold under a chancery decree after two years from date of possession taken by the purchaser, does not debar a minor interested in lands sold

under partition proceedings from filing a bill of review at any time within two years after coming of age. Partition proceedings are governed by an independent chapter of the Code, to which § 3122 has no application. Such a bill may be filed within the time limited by § 3111. *Martin v. Gilleyler*, 70 Miss. 324, 12 So. 254 (1892).

RESEARCH REFERENCES

ALR. Basis of computation of cotenants' accountability for minerals and timber removed from the property. 5 A.L.R.2d 1368.

Am Jur. 59 Am. Jur. 2d, Partition §§ 73 et seq.

19 Am. Jur. Pl & Pr Forms (Rev), Partition, Forms 191 et seq. (Proceedings, orders, and judgments after partition or sale in partition).

CJS. 68 C.J.S., Partition § 108.

§ 11-21-37. Recording of judgments.

Judgments making partition shall be recorded in the record book of conveyances of the county or district in which any of the lands are situated, within three (3) months after the partition is confirmed; and a partition, the judgment making which is not so deposited with the clerk for record, shall not be valid as against purchasers without notice, or against creditors.

SOURCES: Codes, 1871, § 1828; 1880, § 2569; 1892, § 3113; Laws, 1906, § 3537; Hemingway's 1917, § 2849; Laws, 1930, § 2937; Laws, 1942, § 978; Laws, 1991, ch. 573, § 58, eff from and after July 1, 1991.

Cross References — Creation of a lien on land sold on credit pursuant to an order of the chancery court, see § 11-5-97.

Rule that a decree cannot be assailed collaterally except for fraud, see § 91-1-31.

Procedural rules applicable to civil actions, see Miss. R. Civ. P. 1 et seq.

§ 11-21-39. Lien created by party binding on his share.

Any mortgage or other lien executed by any joint tenant, tenant in common, or coparcener, shall remain in force on the share of such cotenant after partition, and on his share only; but this shall not prevent the holder of such mortgage or other lien from asserting claim to owelty awarded to such cotenant.

SOURCES: Codes, 1857, ch. 36, art. 62; 1871, § 1836; 1880, § 2572; 1892, § 3115; Laws, 1906, § 3539; Hemingway's 1917, § 2851; Laws, 1930, § 2938; Laws, 1942, § 979.

Cross References — Rule that owelty shall be a lien upon the share of the party charged therewith, see § 11-21-33.

Concurrence of liens for erecting, altering, or repairing the same structure, see § 85-7-263.

Procedural rules applicable to civil actions, see Miss. R. Civ. P. 1 et seq.

RESEARCH REFERENCES

Am Jur. 59 Am. Jur. 2d, Partition § 134. **CJS.** 68 C.J.S., Partition § 214.

§ 11-21-41. Paramount rights not affected.

Nothing herein contained shall be construed so as to injure, prejudice, defeat or destroy the estate, right, or title of any person claiming a tract of land, or any part thereof, or any piece or lot of land by title under any other person, or title paramount to the title of the joint tenants, tenants in common, or coparceners, among whom partition may have been made.

SOURCES: Codes, Hutchinson's 1848, ch. 42, art. 2(14); 1857, ch. 36, art. 64; 1871, § 1838; 1880, § 2573; 1892, § 3117; Laws, 1906, § 3540; Hemingway's 1917, § 2852; Laws, 1930, § 2939; Laws, 1942, § 980.

Cross References — Rule that the priority of all instruments is controlled by the date of filing for record, see § 89-5-5.

Procedural rules applicable to civil actions, see Miss. R. Civ. P. 1 et seq.

RESEARCH REFERENCES

ALR. Grant of part of cotenancy land, subject of protection through partition. 77 taken from less than all cotenants, as A.L.R.2d 1376.

§ 11-21-43. Party evicted to have partition of residue.

If any person who has received a share of land partitioned, shall be evicted therefrom, or from any portion thereof, by a paramount title existing at the time of the partition, and there be a residue of land left not subject to such paramount title, the party so evicted shall be entitled to a new partition of the residue.

SOURCES: Codes, 1857, ch. 36, art. 61; 1871, § 1835; 1880, § 2571; 1892, § 3114; Laws, 1906, § 3538; Hemingway's 1917, § 2850; Laws, 1930, § 2940; Laws, 1942, § 981.

Cross References — Procedural rules applicable to civil actions, see Miss. R. Civ. P. 1 et seq.

RESEARCH REFERENCES

Am Jur. 59 Am. Jur. 2d, Partition §§ 9, 10.

§ 11-21-45. New partition; when.

Where the partition was in kind, any joint tenant, tenant in common, or coparcener shall be entitled to a new partition at any time within one year after the first partition, provided, he shall present his sworn petition for that purpose to the chancery court which decreed the partition and shall show

thereby (a) that at the time of the partition he was absent from, or a nonresident of the state, and (b) that neither he nor any agent of his received any notice or knowledge whatever of the pendency of the bill for partition, and (c) that the first partition was unfair or unjust or fraudulent as to him, and (d) shall exhibit with said petition the affidavit of at least one credible person to the same effect. Whereupon, if satisfied with the truth of all the grounds aforesaid, the court may proceed to award a new partition; but one who has made improvements on the share first assigned him shall not be evicted from such share; nor shall the improvements be estimated by the second commissioners in fixing its value, but it shall be valued as though the improvements had not been made. If the premises have been sold, and purchased by any of the joint tenants, tenants in common, or coparceners, the nonresident or absent joint tenant, tenant in common or coparcener shall be entitled to set aside such sale at any time within one year thereafter, if it can be shown to have been unfairly made, and fraudulent as to him. In proceedings under this section, all persons interested shall be summoned to appear and contest the application.

SOURCES: Codes, 1857, ch. 36, art. 60; 1871, § 1834; 1880, § 2574; 1892, § 3118; Laws, 1906, § 3541; Hemingway's 1917, § 2853; Laws, 1930, § 2941; Laws, 1942, § 982.

Cross References — Procedural rules applicable to civil actions, see Miss. R. Civ. P. 1 et seq.

JUDICIAL DECISIONS

1. In general.

Review of a decree is barred by limitations where not sought within two years after the person seeking review reached majority. *Welch v. Parker*, 242 Miss. 331, 135 So. 2d 851 (1961).

Where a decree for partition is void as to a non-resident defendant because of defective publication, such defendant may set aside the decree not only as to himself but as to all the parties, and may thereafter defend by showing that the complainant who claimed title to the interest of one of several tenants in common, not a party to

the suit by virtue of an execution sale, had never in fact acquired such interest because the judgment in execution under which he purchased was void. *Moore v. Summerville*, 80 Miss. 323, 31 So. 793 (1902), reh'g denied, 80 Miss. 323, 32 So. 294 (1902).

In such case the tenant whose interest was claimed by the complainant is a proper party to the proceeding to vacate the decree and sale thereunder. *Moore v. Summerville*, 80 Miss. 323, 31 So. 793 (1902), reh'g denied, 80 Miss. 323, 32 So. 294 (1902).

PERSONALTY

SEC.

- 11-21-71. Partition of personality.
- 11-21-73. Partition by county court or justice court.
- 11-21-75. By whom partition made, if ordered.
- 11-21-77. Writ to seize property, and proceedings.
- 11-21-79. Sale; how made when ordered.
- 11-21-81. Appeal to the circuit court.

§ 11-21-71. Partition of personalty.

Any person entitled to a division of personal property may apply therefor to the chancery court of the proper county, subject to the foregoing provisions of Sections 11-21-1 through 11-21-45 in reference to land, as far as applicable, considering the difference in the kind of property; and a sale or a division may be ordered in such cases, as provided for in case of land which is incapable of equal division, or which it may be to the interest of the parties to sell, and the court shall have power to make all such orders as may be necessary to protect the rights of parties. And any sale or partition ordered in such cases shall be made and reported as in case of the sale or partition of land; and decrees making partition shall vest title according to their terms. In such cases, the court or chancellor may make all orders, and cause to be issued all process necessary to secure the rights of parties; and writs of sequestration may be issued as provided for in any other cases in which they are authorized.

SOURCES: Codes, 1880, §§ 2578, 2579; 1892, § 3120; Laws, 1906, § 3543; Hemingway's 1917, § 2855; Laws, 1930, § 2942; Laws, 1942, § 983.

Cross References — Jurisdiction of county court as to partition of personalty, see § 9-9-1.

Partition of personal property by justice of the peace, see § 11-21-73.

Writs of sequestration, see chapter 29 of this title.

Procedural rules applicable to civil actions, see Miss. R. Civ. P. 1 et seq.

JUDICIAL DECISIONS

1. In general.

Wife's prior unsuccessful divorce action against her husband did not bar her subsequent action for statutory partition of the parties' real and personal property pursuant to Miss. Code Ann. §§ 11-21-3 and 11-21-71; doctrine of *res judicata* did not apply as the divorce and the partition action did not share identity of cause of action. *Miller v. Miller*, 838 So. 2d 295

(Miss. Ct. App. 2002), cert. denied, 837 So. 2d 771 (Miss. Ct. App. 2003).

Chancery court has jurisdiction of proceeding for partition of personalty. *Barry v. Mattocks*, 156 Miss. 424, 125 So. 554 (1930).

Partition of personalty, as well as of land, must be between joint tenants, tenants in common, or coparceners. *White v. Lefoldt*, 78 Miss. 173, 28 So. 818 (1900).

RESEARCH REFERENCES

Am Jur. 19 Am. Jur. Pl & Pr Forms (Rev), Partition, Forms 61-64 (Judicial partition of personal property).

CJS. 68 C.J.S., Partition § 22.

§ 11-21-73. Partition by county court or justice court.

A tenant in common of personal property, not exceeding in value the amount provided in Section 9-11-9, may apply for a partition of it by petition in writing to the county court of the county in which the property or some part of it may be, or, in counties not having a county court, to the justice court of the county in which the property or some part of it may be. Thereupon, all the

cotenants shall be summoned and the rights of parties ascertained, and an order made for a division of the property. If the property be incapable of division in kind according to the several interests, or if a sale and division of the proceeds will better promote the interests of parties, the county court or justice court, as the case may be, shall order a sale and a division of its proceeds, and may designate a person to make the sale, and may issue execution specially framed to that end, and make all orders necessary or proper to protect the rights of parties and to effect a sale and division of the proceeds.

SOURCES: Codes, 1880, § 2580; 1892, § 3121; Laws, 1906, § 3544; Hemingway's 1917, § 2856; Laws, 1930, § 2943; Laws, 1942, § 984; Laws, 1981, ch. 471, § 31; Laws, 1982, ch. 423, § 28, made eff from and after January 1, 1984, or, with respect to a given county, from and after such earlier date as the county appoints a justice court clerk pursuant to § 9-11-27(3).

Editor's Note — Laws, 1981, ch. 471, § 60, provides as follows:

"SECTION 60. Section 8 of this act shall take effect and be in force from and after the date it is finally effectuated under Section 5 of the Voting Rights Act of 1965, as amended and extended. Sections 4, 48 and 59 of this act shall take effect and be in force from and after passage. Sections 17 and 22 of this act shall take effect and be in force from and after March 31, 1982. Sections 15, 16 and 58 of this act shall take effect and be in force from and after July 1, 1983. Sections 20, 23, 24, 25, 26, 27, 29, 30, 31, 34, 35, 36, 37, 38, 39, 41, 42, 46, 47, 49, 50, 51, 52, 54, 55, 56 and 57 of this act shall take effect from and after January 1, 1984, or with respect to a given county, from and after such earlier date as such county elects to employ a clerk for the justice court of such county in accordance with the provisions of subsection (3) of Section 7 of this act. Sections 9, 10, 18, 19 and 43 of this act shall take effect and be in force from and after January 1, 1984." (As amended by Laws, 1982, ch. 423, § 28, eff from and after March 31, 1982)."

Cross References — Jurisdiction of county court, see § 9-9-1.

Civil jurisdiction of justices of the peace generally, see § 9-11-9.

Procedural rules applicable to civil actions, see Miss. R. Civ. P. 1 et seq.

JUDICIAL DECISIONS

1. In general.

A tenant holding over after expiration of the original term in a lease "with option to rent annually" is not subject to ejectment if notice of an intent and purpose to exercise the option has been established; such provision does not require execution of a new lease covering the extended term. *McKeithen v. Bush*, 201 Miss. 664, 29 So. 2d 310 (1947), motion overruled, 201 Miss. 665, 30 So. 2d 83 (1947).

Under this section [Code 1942, § 984], after condition broken, a trustee in a deed of trust conveying an undivided interest in personalty has such interest as will entitle him to maintain a suit for partition before a justice of the peace of property of less value than one hundred and fifty dollars. *Porter v. Stone*, 70 Miss. 291, 12 So. 208 (1892).

RESEARCH REFERENCES

CJS. 68 C.J.S., Partition § 29.

§ 11-21-75. By whom partition made, if ordered.

If partition be ordered, it shall be made by the county court or the justice of the peace, as the case may be, who shall value the property and divide it equally into as many shares as there are separate owners, and allot the several shares to the different owners after the manner prescribed for the proceeding of commissioners to make partition of real estate, as nearly as may be. A statement of such allotment shall be made by the county judge or the justice on his docket, so as to show what property was allotted to each party. The allotment shall vest the title of the property in the parties to whom it is allotted.

SOURCES: Codes, 1880, § 2581; 1892, § 3122; Laws, 1906, § 3545; Hemingway's 1917, § 2857; Laws, 1930, § 2944; Laws, 1942, § 985.

Editor's Note — Pursuant to Miss. Const., Art. 6, § 171, all references in the Mississippi Code to justice of the peace shall mean justice court judge.

§ 11-21-77. Writ to seize property, and proceedings.

If the petitioner make affidavit at the commencement of his suit, or afterwards, of his right as a tenant in common, and that there is danger of the removal of the property, so as to defeat or endanger his right, the county court or the justice of the peace, as the case may be, shall issue a writ for the seizure of the property; and if the person having it in possession will not give a bond with sufficient sureties, approved by the officer executing the writ, conditioned to have the property forthcoming to abide the final order which shall be made in the case, payable to the petitioner, in a sum sufficient to cover his interest in the property, it shall be delivered to petitioner on his giving a bond, payable to the person from whom it was taken, with sufficient sureties, approved as above provided, in a penalty equal to the value of the interest of such person, conditioned to have the property before the county court or the justice of the peace, as the case may be, to abide the final order in the case; but if neither party give the required bond, the property shall remain in the hands of the officer, unless it be perishable or expensive to keep, in which case it shall be sold, as such property seized under attachment is sold, and the proceeds of the sale shall be disposed of according to the rights of the parties.

SOURCES: Codes, 1880, § 2583; 1892, § 3124; Laws, 1906, § 3547; Hemingway's 1917, § 2859; Laws, 1930, § 2945; Laws, 1942, § 986.

Editor's Note — Pursuant to Miss. Const., Art. 6, § 171, all references in the Mississippi Code to justice of the peace shall mean justice court judge.

Cross References — Writ of sequestration and affidavit and bond required therefor, see §§ 11-29-1 et seq.

Seizure of property as remedy available to holder of lien on the property, see § 85-7-31.

Rule that personal representative shall not remove estate property out of state, see § 91-7-257.

Seizure of property about to be removed from state, see § 93-13-65.

§ 11-21-79. Sale; how made when ordered.

A sale of property ordered by the county court or a justice of the peace, as the case may be, to be made for a division of the proceeds shall be made for cash and on such notice and at such place as sales of like property are made under execution issued by the county court or a justice of the peace, and the money arising from the sale shall be paid to the county court or the justice of the peace, as the case may be, for division among the parties.

SOURCES: Codes, 1880, § 2584; 1892, § 3125; Laws, 1906, § 3548; Hemingway's 1917, § 2860; Laws, 1930, § 2946; Laws, 1942, § 987.

Editor's Note — Pursuant to Miss. Const., Art. 6, § 171, all references in the Mississippi Code to justice of the peace shall mean justice court judge.

Cross References — Sale of land when this best serves the interests of the parties to a partition action, see § 11-21-27.

RESEARCH REFERENCES

Am Jur. 14 Am. Jur. Legal Forms 2d, Partition, §§ 193:55-193:57 (Deed of commissioner or referee following sale).

§ 11-21-81. Appeal to the circuit court.

A person aggrieved may appeal from the judgment of the county court or the justice of the peace, as the case may be, in refusing or ordering a sale or partition, or in making partition, or from any final action of the county court or the justice of the peace, as the case may be, as in any other civil case decided by the county court or a justice of the peace. On appeal, the circuit court may give such judgment as may be right.

SOURCES: Codes, 1880, § 2582; 1892, § 3123; Laws, 1906, § 3546; Hemingway's 1917, § 2858; Laws, 1930, § 2947; Laws, 1942, § 988.

Editor's Note — Pursuant to Miss. Const., Art. 6, § 171, all references in the Mississippi Code to justice of the peace shall mean justice court judge.

Cross References — Appeal from judgment of a justice of the peace generally, see § 11-51-85.

CHAPTER 23

Trial of Right of Property

SEC.

- 11-23-1. Proceedings when third person claims subject of action.
- 11-23-3. Third party proceeding applicable to officers.
- 11-23-5. Repealed.
- 11-23-7. Claim to property levied on; how interposed.
- 11-23-9. Execution stayed for value of property claimed, unless.
- 11-23-11. Issue to be made up.
- 11-23-13. Default in making up issue.
- 11-23-15. Burden of proof on plaintiff; trial of issue.
- 11-23-17. The judgment.
- 11-23-19. Laws applicable in case of death.
- 11-23-21. New bond may be required.
- 11-23-23. Venue changed in certain cases.
- 11-23-25. Proceedings in justice's court.
- 11-23-27. Form of a claimant's affidavit.
- 11-23-29. Form of a claimant's bond.

§ 11-23-1. Proceedings when third person claims subject of action.

Upon affidavit of a defendant, before pleas filed in any action in a circuit court upon contract or for the recovery of personal property, that a third party, without collusion with him, has a claim to the subject of the action, and that he is ready to pay or dispose of the same as the court may direct, the court may make an order for the safekeeping or payment, or deposit in court, or delivery of the subject matter of the action to such person as it may direct, and an order requiring such third party to be summoned to appear in a reasonable time and maintain or relinquish his claim against the defendant. If such third party, being duly summoned, as provided for in the Mississippi Rules of Civil Procedure, shall fail to appear, the court may declare him barred of all claim in respect to the subject of the action against the defendant therein; but if such third party appear, he shall be allowed to make himself defendant in the action at law instead of the original defendant, who shall be discharged from all liability to either of the other parties, in respect to the subject of the action, upon his compliance with the order of the court for the payment, deposit, or delivery thereof. If the claim of such third party extend to only a part of the subject matter of the action, similar proceedings may be had respecting the part so claimed, and the action shall proceed as to the residue as in other cases.

SOURCES: Codes, 1857, ch. 61, art. 174; 1871, § 656; 1880, § 1578; 1892, § 714; Laws, 1906, § 772; Hemingway's 1917, § 555; Laws, 1930, § 564; Laws, 1942, § 1508; Laws, 1991, ch. 573, § 59, eff from and after July 1, 1991.

Cross References — Method by which a third party may interpose a claim to property levied upon, see §§ 11-23-7 to 11-23-29.

Claim of third person to attached property, see § 11-33-69.

Conflicting claims to goods subject to bill of lading, warehouse receipt or other document of title, see § 75-7-603.

Procedural rules applicable to civil actions, see Miss. R. Civ. P. 1 et seq.

JUDICIAL DECISIONS

1. In general.
2. Persons entitled to invoke statute.
3. Making third person a party.
4. Effect of interpleader.
5. Pleading.
6. Judgment or order.
7. Discharge of defendant.

1. In general.

Debtor, who could have invoked the protection of this section [Code 1942, § 1508], but failed to interplead creditor and garnishee, may not thereafter enjoin execution of judgment taken by creditor on indebtedness. *Rose v. Brister*, 145 Miss. 78, 111 So. 129 (1927).

The interpleader provided for by this section [Code 1942, § 1508] is merely a substitute for an original bill of interpleader in equity and is governed by the same rules. *McAlister Bros. & Co. v. Sanders*, 107 Miss. 283, 65 So. 249 (1914).

This statute was designed to protect the original defendants, if they desired to disclaim and become mere stakeholders for third persons who, they were informed, had an interest. *McCracken v. Lewis*, 89 Miss. 229, 42 So. 671 (1906).

The statute applies to suits before justices of the peace and to actions for money arising under contracts, express or implied, as well as to suits for personal property. *Moore v. Ernst*, 54 Miss. 642 (1877).

2. Persons entitled to invoke statute.

One having a right to interplead a claimant of a fund due by him must be a disinterested stakeholder not interested in the further contest of the liabilities or rights of the parties. *Penn Mut. Life Ins. Co. v. Williams*, 163 Miss. 324, 140 So. 875 (1932).

Where the party summoned into court to maintain or relinquish his claim to a fund paid into court under an affidavit for interpleader makes a claim for a greater amount against the defendant than the original plaintiff made, and it flows out of the same contract or transaction, the de-

fendant is not a disinterested stakeholder, and is not entitled to interplead such claimant under this section [Code 1942, § 1508]. *Penn Mut. Life Ins. Co. v. Williams*, 163 Miss. 324, 140 So. 875 (1932).

Complainant attaching note in chancery held not entitled to be summoned in law action by note holder against maker. *Delta Ins. & Realty Co. v. Fourth Nat'l Bank*, 127 Miss. 152, 89 So. 817 (1921).

In action of replevin by a tenant against his landlord's agent who held possession of the property involved for the landlord, the agent was not compelled to resort to this section, although he might do so if he desired, it being incumbent upon the plaintiff to prove the right of immediate possession in himself. *Scarborough v. Lucas*, 119 Miss. 128, 80 So. 521 (1919).

Where a person claimed an individual joint interest in property replevied, his remedy is not by intervention but by a suit in equity. *McCracken v. Lewis*, 89 Miss. 229, 42 So. 671 (1906).

A defendant, sued upon a contract for the price of timber cut, can interplead a third person who claims ownership of the land and of the trees cut therefrom. *Boyle v. Manion*, 74 Miss. 572, 21 So. 530 (1897).

On the trial of a motion by plaintiff against a sheriff for failure to pay over money realized under execution, it is proper to allow the officer to withdraw his plea and make an affidavit for substitution of a claimant of the fund as the real party in interest. *Kohlman v. First Nat'l Bank*, 71 Miss. 843, 15 So. 131 (1894).

3. Making third person a party.

The act of the original defendant does not make a third person a party; an order of court is necessary. *Ettringham v. Handy*, 60 Miss. 334 (1882).

4. Effect of interpleader.

When insurance company, defendant in suit on life insurance policy by person named as secondary beneficiary in policy, proceeds under this section [Code 1942, § 1508] by interposing its affidavit that

third party is claiming proceeds of policy by change of beneficiary and pays money into court, provision of policy that change of beneficiary must be endorsed on face of policy is waived insofar as insurance company is concerned. *Gayden v. Kirk*, 207 Miss. 861, 43 So. 2d 568, 19 A.L.R.2d 1 (1949), corrected, 208 Miss. 283, 44 So. 2d 410, 15 A.L.R.2d 471 (1950).

When defendant invokes the provisions of this section [Code 1942, § 1508], he thereby admits liability and that the property sought to be recovered is due either to the plaintiff or the third person claimant, and agrees to pay it over to whichever of these parties the court should direct. *McAlister Bros. & Co. v. Sanders*, 107 Miss. 283, 65 So. 249 (1914).

5. Pleading.

Where an interpleader brings in irrelevant matter in the statement of his claim

such irrelevant matter should be disregarded and is not a ground for demurrer. *Caston v. Turner*, 95 Miss. 303, 48 So. 721 (1909).

6. Judgment or order.

A person filing an interpleader cannot afterwards claim that the judgment of the court was erroneous in directing payment to one of the defendants interpleading. *McAlister Bros. & Co. v. Sanders*, 107 Miss. 283, 65 So. 249 (1914).

7. Discharge of defendant.

Where insurance company interpleaded rival claimants and newly joined claimant sought greater recovery than company admitted, discharge of insurance company before issues were made up was error. *Williams v. Penn Mut. Life Ins. Co.*, 160 Miss. 408, 133 So. 649 (1931).

RESEARCH REFERENCES

ALR. Assertion of fiduciary status of party to litigation as basis for intervention by one claiming interest in fruits thereof as trust beneficiary. 2 A.L.R.2d 227.

Am Jur. 45 Am. Jur. 2d, Interpleader §§ 1 et seq.

19 Am. Jur. Pl & Pr Forms (Rev), Par-

ties, Form 251.2 (Third-party complaint — Under federal rule or corresponding state rule — By defendant owner of building in which fatal shooting occurred — Against victim's employer).

CJS. 48 C.J.S., Interpleader §§ 10 et seq.

§ 11-23-3. Third party proceeding applicable to officers.

The provisions of the Section 11-23-1 shall be applicable to any action brought in a circuit court against a sheriff or other officer for the recovery of personal property taken by him under executions or attachment, or for the proceeds of property so taken and sold by him; and the defendant in any such action shall have the benefit of said provisions against the party in whose favor the execution or attachment issued by making affidavit that the property, for the recovery of which or its proceeds the action is brought, was taken under process, describing it; and in such case the judgment of the court shall be framed to effect justice between the parties according to their rights.

SOURCES: Codes, 1857, ch. 61, art. 175; 1871, § 657; 1880, § 1579; 1892, § 715; Laws, 1906, § 774; Hemingway's 1917, § 557; Laws, 1930, § 566; Laws, 1942, § 1509.

Cross References — Motions against officers of the court for money collected and not paid over, see § 9-7-89.

Remedy against officer for failure to deliver any fine, forfeiture, or penalty into the county treasury, see § 11-7-219.

Proceedings against attorneys for money collected for clients, but not paid over, see § 11-49-3.

Issuance of executions by clerks of court, see § 13-3-111.

Failure by sheriff to pay over money collected by virtue of execution or attachment, or omission to execute process, see §§ 19-25-45 to 19-25-49.

Procedural rules applicable to civil actions, see Miss. R. Civ. P. 1 et seq.

JUDICIAL DECISIONS

1. In general.

In a judgment obtained by the widow for the benefit of the children the children are co-plaintiffs with the widow, the sheriff owes them the same duty he does the widow and he has notice of their interests. *Kelly v. Howard*, 98 Miss. 543, 54 So. 10 (1910); *Howard v. Kelly*, 111 Miss. 285, 71 So. 391 (1916).

On trial of a motion by a plaintiff against a sheriff for failure to pay over money realized under execution, it is proper under this section [Code 1942, § 1509] to allow the officer to withdraw his plea and make an affidavit for substitution of a claimant of the fund as the real party in interest. *Kohlman v. First Nat'l Bank*, 71 Miss. 843, 15 So. 131 (1894).

RESEARCH REFERENCES

Am Jur. 63C Am. Jur. 2d, Public Officers and Employees § 401.

§ 11-23-5. Repealed.

Repealed by Laws, 1991, ch. 573, § 141, eff from and after July 1, 1991.

[Codes, 1857, ch. 61, art. 177; 1871, § 659; 1880, § 1580; 1892, § 716; 1906, § 774; Hemingway's 1917, § 557; 1930, § 566; 1942, § 1510]

Editor's Note — Former § 11-23-5 provided that third party proceedings were applicable to offices, and provided for notice when the plaintiff was a nonresident.

§ 11-23-7. Claim to property levied on; how interposed.

When any person not a party to the execution shall claim to be the owner of or to have a lien on any personal property levied upon, such person may make affidavit to his right or title to the property, and may enter into bond, payable to the plaintiff in the execution, with one or more sufficient sureties, in the penalty of double the value of the property claimed, or in double the amount of the execution, if that be less than the value of the property, to be estimated by the officer holding the execution, and indorsed thereon, conditioned for the prosecution of the claim with effect, or, in case of failure therein, for the payment to the plaintiff in the execution of all damages that may be awarded against the claimant, and for the delivery of the property to the proper officer; and upon the making of the affidavit and bond, the officer holding the execution shall receive the same, and shall deliver the property to the claimant, and return the affidavit and bond with the execution. The claim may be interposed without giving bond, and the same proceedings be had thereon except that the property claimed shall not be delivered to the claimant, but shall be sold, as provided in case of property of like kind seized in replevin,

or, if not such as should be sold, shall be held by the officer. The bond of the claimant shall stand as security to the parties to the action and judgment may be rendered on it according to the exigency.

SOURCES: Codes, Hutchinson's 1848, ch. 62, art. 1 (25); 1857, ch. 61, art. 295; 1871, § 858; 1880, § 1774; 1892, § 4425; Laws, 1906, § 4990; Hemingway's 1917, § 3264; Laws, 1930, § 3424; Laws, 1942, § 1021.

Cross References — Jurisdiction of county courts, generally, see § 9-9-21.

Proceedings in replevin, attachment, or as to liens before a justice of the peace, see § 11-9-135.

Proceedings when third person claims subject of action, see § 11-23-1.

Claim of third party to attached property being governed by procedure herein, see § 11-33-69.

Third person's interposition of claim to attached property, see § 11-33-69.

Time limit for issuance of executions on judgments, see § 13-3-111.

How executions shall be issued and returned, see § 13-3-113.

Requirement of bond of indemnity for levy, see § 13-3-157.

Duty of officer to examine judgment-roll prior to payment of money for sale of property, see § 13-3-181.

Claim by third person interested in property upon which a lien is being enforced, see § 85-7-49.

Procedural rules applicable to civil actions, see Miss. R. Civ. P. 1 et seq.

JUDICIAL DECISIONS

1. In general.

Claimant's issue and right to bring third person and defendant in execution is not triable under Code 1906 §§ 4990-5001, where plaintiff in execution fails to establish that personal property seized is liable to execution. *Scruggs v. Electric Paint & Varnish Co.*, 140 Miss. 615, 105 So. 745 (1925).

Where claimant gave bond for attached property and judgment was rendered against him and his sureties, adjudication of claimant as bankrupt does not discharge the liability of claimant and has sureties on the bond. *Sanderson v. Buckley*, 111 Miss. 748, 72 So. 148 (1916).

Claimant or intervener in attachment is not required to join issue until final judgment. *Mahaffey Co. v. Russell & Butler*, 100 Miss. 122, 54 So. 807 (1911), error overruled, 100 Miss. 126, 54 So. 945 (1911).

Where the contest is between claimants of property and the seller thereof, Code 1906 §§ 163, 3080, so far as applicable may be used the same as if suit arose in attachment. *Quillin v. Paine*, 94 Miss. 696, 47 So. 898 (1909).

The Supreme Court has jurisdiction of an appeal by a claimant where the property claimed exceeds fifty dollars in value and has been, by the circuit court on appeal from a justice's court, subjected to an execution for more than that sum, although the amount in controversy in the original suit was less than fifty dollars. *Andrews v. Partee*, 79 Miss. 80, 29 So. 788 (1901).

The assignee of a landlord's claim for rent is entitled to the remedy by claimant's issue under this section [Code 1942, § 1021]. *Thomas v. Shell*, 76 Miss. 556, 24 So. 876 (1899).

The remedy provided in this section [Code 1942, § 1021] to enforce a lien on property seized under execution existed under Code of 1880, § 1774. *Trice v. Walker*, 71 Miss. 968, 15 So. 787 (1894).

The plaintiff must fail in the trial of this issue whether claimant has title or lien or not, unless plaintiff shows the property liable to his execution. *Trice v. Walker*, 71 Miss. 968, 15 So. 787 (1894).

An affidavit in conformity with this section [Code 1942, § 1021] is sufficient foundation for the claim of a third person replevying property attached for rent and

advances. *Watkins v. Duvall*, 69 Miss. 364, 13 So. 727 (1891).

After a levy upon property claimed by a third party, subsequent levies upon other property to the full amount of the execution, though irregular, will not affect the original levy. *Davis v. Netterville*, 68 Miss. 429, 10 So. 32 (1890).

The statute does not apply to a special execution in replevin. *Andrews v. McLeod*, 66 Miss. 348, 6 So. 181 (1889).

The court from which the execution is-

sued alone has jurisdiction of the claimant's issue. *Clark v. Clinton*, 61 Miss. 337 (1883).

If the claim be dismissed by the court for failure to file the proper affidavit, the dismissal is a determination of the claim, and a failure to deliver the property a breach of the claimant's bond. *Higdon v. Vaughn*, 58 Miss. 572 (1882).

A claim cannot be maintained for an undivided interest in personalty. *Willis v. Loeb*, 59 Miss. 169 (1881).

ATTORNEY GENERAL OPINIONS

Section 11-23-7 prescribes procedures to be followed when a third party makes a claim of ownership in or claims a lien on the property being levied on. In such case

the third party may hold up the execution by posting bond. *Richardson*, September 13, 1995, A.G. Op. #95-0229.

RESEARCH REFERENCES

ALR. Constitutionality, construction, and application of statute as to effect of taking appeal, or staying execution, on right to redeem from execution or judicial sale. 44 A.L.R.4th 1229.

Am Jur. 30 Am. Jur. 2d, Executions §§ 240, 243, 244.

CJS. 33 C.J.S., Executions §§ 196-201.

§ 11-23-9. Execution stayed for value of property claimed, unless.

Further proceedings on the execution shall be stayed for an amount equal to the value of the property claimed, as returned by the officer, until final decision of the claim; and on all subsequent executions issued on the judgment prior to the final decision of the claim, the clerk shall indorse the amount of the estimated value for the government of the officer to whom the same may be directed; but the plaintiff may dismiss the levy, and have execution as if it were never made.

SOURCES: Codes, *Hutchinson's* 1848, ch. 62, art. 8 (2); 1857, ch. 61, art. 296; 1871, § 859; 1880, § 1775; 1892, § 4426; Laws, 1906, § 4991; *Hemingway's* 1917, § 3265; Laws, 1930, § 3425; Laws, 1942, § 1022.

Cross References — Procedural rules applicable to civil actions, see Miss. R. Civ. P. 1 et seq.

RESEARCH REFERENCES

ALR. Constitutionality, construction, and application of statute as to effect of taking appeal, or staying execution, on

right to redeem from execution or judicial sale. 44 A.L.R.4th 1229.

§ 11-23-11. Issue to be made up.

Upon the return of the execution with the affidavit and bond, if any, the court shall, on motion of the plaintiff in execution, direct an issue to be made up between the parties to try the right of property at the same term, unless good cause be shown for a continuance.

SOURCES: Codes, Hutchinson's 1848, ch. 62, art. 1 (25); 1857, ch. 61, art. 295; 1871, § 858; 1880, § 1774; 1892, § 4427; Laws, 1906, § 4992; Hemingway's 1917, § 3266; Laws, 1930, § 3426; Laws, 1942, § 1023.

Cross References — Procedural rules applicable to civil actions, see Miss. R. Civ. P. 1 et seq.

JUDICIAL DECISIONS

1. In general.

Claimant's issue must be made up at the return term. *White v. Roach*, 98 Miss. 309, 53 So. 622 (1910).

If an issue be made and a trial had, it will be presumed to have been made under the direction of the court. *McAnulty v.*

Bingaman, 7 Miss. (6 Howard) 382 (1842); *Phillips v. Cooper*, 50 Miss. 722 (1874).

Where several executions are levied, there should be separate issues, trials and judgments. *McAnulty v. Bingaman*, 7 Miss. (6 Howard) 382 (1842).

§ 11-23-13. Default in making up issue.

If by default of the plaintiff in execution an issue for the trial of the right of property be not made up at the term to which the execution is returnable, the court shall discharge the claimant from his bond, and the property shall not thereafter be subject to execution on plaintiff's judgment; but if the claimant fail to join issue when tendered at the first term, the court, at the instance of the plaintiff in execution, shall order a writ of inquiry as to the value of the property, and also to inquire whether or not the claim was made for fraudulent purposes or for purposes of delay.

SOURCES: Codes, 1857, ch. 61, art. 297; 1871, § 860; 1880, § 1776; 1892, § 4428; Laws, 1906, § 4993; Hemingway's 1917, § 3267; Laws, 1930, § 3427; Laws, 1942, § 1024.

Cross References — Procedural rules applicable to civil actions, see Miss. R. Civ. P. 1 et seq.

JUDICIAL DECISIONS

1. In general.

Trial court may allow judgment creditor to join issue on third party claim after expiration of term to which garnishment was returnable and at which claim was filed. *Wineman v. Clover Farms Dairy*, 168 Miss. 583, 151 So. 749 (1934).

Trial court's decision allowing judgment creditor to join issue on third party claim after term to which garnishment is returnable is reviewable only in case of abuse of discretion. *Wineman v. Clover Farms Dairy*, 168 Miss. 583, 151 So. 749 (1934).

Plaintiff's failure to make issue at return term to try claimant's right to funds in garnishee's hands held not to constitute "default." *Piqua Sav. Bank v. Copiah Hdwe. Co.*, 146 Miss. 581, 111 So. 836 (1927).

Claimant's issue must be made up at return term. *White v. Roach*, 98 Miss. 309, 53 So. 622 (1910).

It is the duty of both plaintiff in execution and claimant to see that issue is joined as provided by this section [Code 1942, § 1024] and if either fails to do so it

cannot be done afterwards, but only such proceedings can be had as the statute provides upon default of plaintiff or claimant, as the case may be. *Bedford, French & Goodwin Co. v. W.T. Adams Mach. Co.*, 93 Miss. 537, 47 So. 429 (1908).

It is the duty of the plaintiff to see that the sheriff returns the execution with the claimant's affidavit and bond, if any, by a day early enough to have an issue made up and tried at the return term of the execution. *Sears v. Gunter*, 39 Miss. 338 (1860).

§ 11-23-15. Burden of proof on plaintiff; trial of issue.

On the trial of the issue, the burden of proof shall be on the plaintiff in execution, and the issue shall be tried as in ordinary actions at law, and either party shall have the same rights as in other trials. The jury trying the issue, in case it find in favor of the plaintiff in execution, shall assess the value of the property subject to the execution, and shall certify whether the claim was made for fraudulent purposes or for delay. The valuation of the officer taking the bond of the claimant shall be prima facie evidence of the value of the property; and in case the jury fail to find the value of the property, the plaintiff may, at his election, take judgment for the value as returned by the officer, or have a writ of inquiry.

SOURCES: Codes, *Hutchinson's* 1848, ch. 62, art. 1 (25); 1857, ch. 61, art. 298; 1871, § 861; 1880, § 1777; 1892, § 4429; Laws, 1906, § 4994; *Hemingway's* 1917, § 3268; Laws, 1930, § 3428; Laws, 1942, § 1025.

Cross References — Procedural rules applicable to civil actions, see Miss. R. Civ. P. 1 et seq.

JUDICIAL DECISIONS

1. Burden of proof.
2. Evidence necessary.
3. Value of property.
4. Jury to assess value.

1. Burden of proof.

Upon the issue of the trial of the rights of property, the burden of proof was upon the judgment creditor to show that the property seized under execution was the property of the judgment debtor, and the introduction of a decree against the judgment debtor was not sufficient to establish ownership against the claimants. *Martin v. McGraw*, 190 So. 2d 442 (Miss. 1966).

A plaintiff in execution, upon the trial of the claimant's issue, must produce evi-

dence of his right to proceed against the property before claimant can put to defense. *Reed v. GMAC*, 228 Miss. 121, 87 So. 2d 95 (1956).

Where a judgment debtor transferred his automobile to his wife prior to execution thereon, giving rise to question that if the automobile was exempt to the judgment debtor, his wife got it free from the judgment, and if the judgment debtor claimed the exemption given by Code 1942, § 1755, he was not entitled to the exemption provided by Code 1942, § 1766, and vice versa, the trial court erred in rendering judgment for the judgment creditor on the theory that the burden to resolve such question was on the

claimant. *Reid v. Halpin*, 185 Miss. 396, 188 So. 310 (1939).

On trial of claimant's issue burden of proof is on plaintiff in attachment. *Third Nat'l Bank v. Reeves Grocery Co.*, 113 Miss. 35, 73 So. 866 (1917).

It is error to instruct the jury that the judgment sustaining the attachment is prima facie evidence against the claimant, and places the burden of proof on him to show that he is a bona fide purchaser. The burden is always on the plaintiff to show that the goods are liable to his attachment. *Ott v. Smith*, 68 Miss. 773, 10 So. 70 (1891).

If the plaintiff fail to show that the property is liable to his execution, he cannot recover, even though claimant have no title. *Ross v. Garey*, 8 Miss. (7 Howard) 47 (1843); *Luther v. Borden*, 48 U.S. 1, 12 L. Ed. 581 (1849); *Thornhill v. Gilmer*, 12 Miss. (4 S. & M.) 153 (1845); *Selser v. Ferriday*, 21 Miss. (13 S. & M.) 698 (1850).

2. Evidence necessary.

In order to recover plaintiff must offer in evidence the judgment on which the execution was issued, the execution itself and the officer's return thereon. *Beeson-Moore Motor Co. v. Catlett*, 128 Miss. 865, 91 So. 564 (1922).

On the trial of a claimant's issue for property levied upon under execution the plaintiff cannot recover without offering in evidence the judgment upon which the execution was issued. *Blalack v. Stevens*, 81 Miss. 711, 33 So. 508 (1903).

On the trial of the issue, the judgment of the plaintiff against the defendant in attachment is a part of the record, and need not be offered in evidence. *French v. Sale*, 60 Miss. 516 (1882).

On the trial the execution and levy is a necessary part of the plaintiff's evidence. *Ross v. Garey*, 8 Miss. (7 Howard) 47 (1843).

The affidavit is not a part of the record unless made so by a bill of exceptions. *Ross v. Garey*, 8 Miss. (7 Howard) 47 (1843).

3. Value of property.

The value is to be fixed as of the day of trial. *Selser v. Ferriday*, 21 Miss. (13 S. & M.) 698 (1850).

4. Jury to assess value.

The jury must assess the separate value of each article. *Penrice v. Cocks*, 2 Miss. (1 Howard) 227 (1835); *Walker v. Sinking Fund Comm'rs*, 9 Miss. (1 S. & M.) 372 (1843); *Pritchard v. Myers*, 11 Miss. (3 S. & M.) 42 (1844); *Kibble v. Butler*, 22 Miss. (14 S. & M.) 207 (1850).

RESEARCH REFERENCES

Am Jur. 7 *Am. Jur. Pl & Pr Forms* (Rev), *Contracts*, Form 22 (*Instruction to jury — Third-party beneficiaries*).

§ 11-23-17. The judgment.

If the verdict be in favor of the plaintiff in execution, either on an issue joined or on an inquiry by default, or in case the plaintiff take judgment by default, and elect to take the value as returned by the officer, the court shall render judgment against the claimant and the sureties on his bond, for the restoration of the specific property to the officer, if to be had, and, if not, for the payment of its value not exceeding the amount of the original judgment to the plaintiff, and all costs. If the jury find that the claim was made for fraudulent purposes, or for delay, the judgment shall also award the plaintiff ten per centum damages on the value of the property. If the property be restored to the officer, it shall be sold, under a venditioni exponas to be issued for that purpose, as if the claim had not been made. If bond be not given, and the property or its proceeds be in the hands of the officer, the judgment may be modified

accordingly. If the verdict be in favor of the claimant, he shall recover his costs, the levy shall be removed, the claimant shall be discharged from his bond, and the property shall not thereafter be subject to execution on plaintiff's judgment.

SOURCES: Codes, Hutchinson's 1848, ch. 62, art. 8 (6-9); 1857, ch. 61, art. 299; 1871, § 862; 1880, § 1778; 1892, § 4430; Laws, 1906, § 4995; Hemingway's 1917, § 3269; Laws, 1930, § 3429; Laws, 1942, § 1026.

Cross References — Procedural rules applicable to civil actions, see Miss. R. Civ. P. 1 et seq.

JUDICIAL DECISIONS

1. Generally.
2. Measure of recovery.
3. Sureties.
4. Costs.

1. Generally.

Court erroneously ordered claimant of property levied upon, who procured property upon executing bond, to surrender truck to plaintiff in execution. *Mills v. Churchwell Motor Co.*, 154 Miss. 631, 122 So. 773 (1929).

A plaintiff in execution who, on a claimant's issue, failed to show his right to subject the property cannot, after judgment in favor of several claimants thereof, object to the misjoinder of issues or to errors in the judgment as between the several claimants. *Goyer Cold-Storage Co. v. Wildberger*, 71 Miss. 438, 15 So. 235 (1894).

The recovery of a successful plaintiff in a claimant's issue is not invalid because it exceeds the amount of the original judgment with interest and costs. Payment of such amount will be satisfaction and the court of its own motion will protect the claimant as against any excess. *Johnston v. Standard Oil Co.*, 71 Miss. 397, 14 So. 533 (1893).

If a claim be interposed by a trustee in a deed in trust, the plaintiff may prove that the deed in trust was satisfied pending the suit; and in that case he should have judgment for the property, without costs which accrued before the satisfaction. *Helm v. Gray*, 59 Miss. 54 (1881).

The jury should not find that the claim was sued out for fraudulent purposes or delay unless there be evidence to that

effect. *McAnulty v. Bingaman*, 7 Miss. (6 Howard) 382 (1842).

2. Measure of recovery.

Where the wife of the judgment debtor claimed the automobile levied upon by judgment creditors, the measure of the liability of the wife on her claim of fraud, if the judgment creditors should recover a judgment on another trial, would be the value of the automobile at the time the judgment became a lien thereon, less the amount of the unpaid purchase money due and to become due. *Reid v. Halpin*, 185 Miss. 396, 188 So. 310 (1939).

If the judgment creditors should recover a judgment on another trial, after reversal of judgment in their favor based upon an erroneous theory of burden of proof, the measure of the liability of the claimant on her bond would be the value of the automobile at the time the judgment became a lien thereon, less the amount of the unpaid purchase price due and to become due. *Reid v. Halpin*, 185 Miss. 396, 188 So. 310 (1939).

Judgment in favor of a successful plaintiff in a claimant's issue should be for the value of the property at the time of trial, not at the time it was received by the claimant. *Johnston v. Standard Oil Co.*, 71 Miss. 397, 14 So. 533 (1893).

3. Sureties.

The sureties on a claimant's bond cannot assign errors in the suit between the plaintiff and his debtor. *Atkinson v. Foxworth*, 53 Miss. 741 (1876); *Higdon v. Vaughn*, 58 Miss. 572 (1882).

The sureties subject themselves to the authority of the court. They are parties to

the suit, not in the sense of participating in the litigation between the plaintiff and the claimant, but they may show any reason good in law why the bond should not be forfeited. *Atkinson v. Foxworth*, 53 Miss. 741 (1876).

4. Costs.

If the plaintiff succeeded as to a part of the property he is entitled to recover costs. *Clarke v. Parker*, 63 Miss. 549 (1886).

§ 11-23-19. Laws applicable in case of death.

All the provisions of law in reference to the death of either party, and the revival of the cause, in personal actions, and the death of any of the obligors, in a bond given in the progress of a cause, and the proceedings thereon before or after judgment, shall apply to proceedings under Sections 11-23-7 through 11-23-29; but in case the claimant shall die before judgment, and there be no representative of his estate, judgment shall be entered against the sureties on his bond for the property, or the value thereof, as assessed by the sheriff, or to be found by the verdict of a jury impaneled to inquire of the same, at the option of the plaintiff, with interest on such value from the date of the claimant's bond.

SOURCES: Codes, 1857, ch. 61, arts. 300, 301, 302; 1871, §§ 863, 864, 865; 1880, §§ 1779, 1780; 1892, § 4431; Laws, 1906, § 4996; Hemingway's 1917, § 3270; Laws, 1930, § 3430; Laws, 1942, § 1027.

Cross References — Proceedings in case of the death of party or surety on bond generally, see §§ 11-1-29 through 11-1-35.

Procedural rules applicable to civil actions, see Miss. R. Civ. P. 1 et seq.

§ 11-23-21. New bond may be required.

If the sureties on the claimant's bond shall become insufficient, the court, on motion of the plaintiff, may require the claimant to give a new bond or to surrender to the officer the property claimed. If new bond be given, the sureties thereon shall be jointly liable with the sureties on the first bond, but if the claimant fail to give a new bond and to surrender the property, judgment shall be rendered against him and the sureties on his bond as by default. If the claimant surrender the property as required, the sureties on the bond given shall thereby be discharged, and the cause shall be proceeded with as if the officer had retained the property in the first instance.

SOURCES: Codes, 1857, ch. 61, art. 303; 1871, § 866; 1880, § 1781; 1892, § 4432; Laws, 1906, § 4997; Hemingway's 1917, § 3271; Laws, 1930, § 3431; Laws, 1942, § 1028.

Cross References — Procedural rules applicable to civil actions, see Miss. R. Civ. P. 1 et seq.

§ 11-23-23. Venue changed in certain cases.

If the claimant shall not be a resident of the county in which the execution is issued, and the property be levied on in the county of his residence, the

venue for the trial of the issue may be changed, on his application, to the circuit court of the county of his residence, and the result shall be certified to the court. The procedure governing a claimant's objection to venue and transfer thereof shall be as provided for in the Mississippi Rules of Civil Procedure.

SOURCES: Codes, 1880, § 1782; 1892, § 4433; Laws, 1906, § 4998; Hemingway's 1917, § 3272; Laws, 1930, § 3432; Laws, 1942, § 1029; Laws, 1991, ch. 573, § 60, eff from and after July 1, 1991.

Cross References — Venue in circuit court generally, see § 11-11-3.

Procedural rules applicable to civil actions, see Miss. R. Civ. P. 1 et seq.

§ 11-23-25. Proceedings in justice's court.

If the claim be interposed in a court of a justice of the peace, on filing the affidavit and bond, or the affidavit, if a bond be not given, the justice shall fix a day for the trial, and give notice thereof to the parties.

SOURCES: Codes, Hutchinson's 1848, ch. 50, art. 11 (5); 1857, ch. 58, art. 31; 1871, § 1338; 1880, § 2227; 1892, § 4434; Laws, 1906, § 4999; Hemingway's 1917, § 3273; Laws, 1930, § 3433; Laws, 1942, § 1030.

Editor's Note — Pursuant to Miss. Const. Art. 6, § 171, all reference in the Mississippi Code to justice of the peace shall mean justice court judge.

Cross References — Civil jurisdiction of justices of the peace, generally, see § 9-11-9.

JUDICIAL DECISIONS

1. In general.

The justice of the peace has jurisdiction to try the claim to property levied on under execution from his court, although

the value of the property exceed two hundred dollars. *Clark v. Clinton*, 61 Miss. 337 (1883); *Bernheimer v. Martin*, 66 Miss. 486, 6 So. 326 (1889).

§ 11-23-27. Form of a claimant's affidavit.

A claimant's affidavit may be in the following form, viz.:

State of Mississippi, _____ County:

"Before me, _____, a justice of the peace of said county, _____ makes oath that a certain _____ [here describe the property], levied on by virtue of an execution in favor of _____ against _____, issued by _____, a justice of the peace of said county, on the _____ day of _____, A. D. _____, and now in the hands of _____, a _____ of _____ county, under said execution, is the property of affiant, and is not the property of _____."

"Sworn to and subscribed before me, _____, A. D. _____, J. P."

SOURCES: Codes, 1880, § 2257; 1892, § 4435; Laws, 1906, § 5000; Hemingway's 1917, § 3274; Laws, 1930, § 3434; Laws, 1942, § 1031.

Editor's Note — Pursuant to Miss. Const., Art. 6, § 171, all references in the Mississippi Code to justice of the peace shall mean justice court judge.

§ 11-23-29. Form of a claimant's bond.

A claimant's bond may be in the following form, viz.:

"We, _____, principal, and _____ and _____, sureties, bind ourselves to pay _____ dollars, unless the said _____ shall prosecute with effect his claim to a _____ [here describe the property], levied on by virtue of an execution issued on the _____ day of _____, A.D. _____, by _____ court of _____ county, in favor of _____ against _____, returnable before the _____ court on the _____ day of _____, A.D. _____, and valued at _____ dollars: or, in case he fail therein, shall pay to the said _____ all such damages as may be awarded against the said _____, in case his claim shall not be sustained, and shall deliver the same property to the officer having said execution, if the claim thereto shall be determined against the said _____.

"Witness our hands, this _____ day of _____, A. D. _____.

"_____,
 "_____,
 "_____,

"I approve the foregoing bond and sureties, this the _____ day of _____, A.D. _____.

_____ Sheriff."

SOURCES: Codes, 1880, § 2558; 1892, § 4436; Laws, 1906, § 5001; Hemingway's 1917, § 3275; Laws, 1930, § 3435; Laws, 1942, § 1032.

CHAPTER 25

Unlawful Entry and Detainer

Article 1.	Proceedings Before Justice Court	11-25-1
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ARTICLE 1.

PROCEEDINGS BEFORE JUSTICE COURT.

SEC.

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§ 11-25-1. In what cases a remedy.

Any one deprived of the possession of land by force, intimidation, fraud, stratagem, stealth, and any landlord, vendor, vendee, mortgagee, or trustee, or cestui que trust, or other person against whom the possession of land is withheld, by his tenant, vendee, vendor, mortgagor, grantor, or other person, after the expiration of his right by contract, express or implied, to hold possession, and the legal representatives or assigns of him who is so deprived of possession, or from whom possession is so withheld, as against him who so obtained possession, or withholds possession after the expiration of his right, and all persons claiming to hold under him, shall, at any time within one year after such deprivation or withholding of possession, be entitled to the summary remedy herein prescribed.

SOURCES: Codes, Hutchinson's 1848, ch. 56, art. 7(2); 1857, ch. 42, arts. 2, 3; 1871, § 1582; 1880, § 2645; 1892, § 4461; Laws, 1906, § 5039; Hemingway's 1917, § 3311; Laws, 1930, § 3456; Laws, 1942, § 1033.

Cross References — Provision granting exclusive jurisdiction of unlawful entry and detainer proceedings to county courts, see § 9-9-21.

Jurisdiction of county court generally, see § 9-9-21.

Actions in ejectment, see § 11-19-1.

Parallel provision, see § 11-25-101.

Appeal in cases of unlawful entry and detainer, see § 11-51-83.

Limitation of actions concerning land, see § 15-1-7.

Rule that right of entry is not tolled by death of disseizor, see § 89-1-19.

JUDICIAL DECISIONS

1. In general.

Grantees of a purchaser at a deed of trust foreclosure sale were entitled to maintain an action of unlawful entry and detainer under this section [Code 1942, § 1033] against the grantors under the deed of trust who remained in, and re-

fused to surrender, possession of the property after the deed of trust was foreclosed, and could recover compensation for the use and occupancy of the property. *Martin v. Leslie*, 229 Miss. 656, 91 So. 2d 743 (1957).

RESEARCH REFERENCES

Am Jur. 35 Am. Jur. 2d, Forcible Entry and Detainer §§ 10, 11.

12 Am. Jur. Pl & Pr Forms (Rev), Forcible Entry and Detainer, Forms 11 et seq. (complaints in summary proceedings to recover possession of realty).

21 Am. Jur. Proof of Facts 2d 567, Forcible Entry and Detainer: Requisite Right, Title or Possession of Plaintiff.

21 Am. Jur. Proof of Facts 2d 607, Forcible Entry and Detainer: Requisite Force by Defendant.

CJS. 36A C.J.S., Forcible Entry and Detainer §§ 21-26.

Law Reviews. Ownership of Crops on Foreclosed Land, Priority of After-Acquired Property Clauses in Farm Bankruptcies. 58 Miss. L. J. 481, Winter 1988.

§ 11-25-3. Purchaser at sale for taxes.

The purchaser of land at a sale for taxes, or his vendee, after two years from the date of the sale for taxes, and within three years from such date, may bring the action of unlawful detainer, for the recovery of possession of the land; and a judgment in his favor in the action shall be a bar to any action in any court brought after one year from the date of such judgment, to controvert the tax title to the land, saving the rights of infants and persons of unsound mind to redeem the same.

SOURCES: Codes, 1880, § 538; 1892, § 4461a; Laws, 1906, § 5040; Hemingway's 1917, § 3312; Laws, 1930, § 3457; Laws, 1942, § 1034.

Cross References — A definition of the term "infant", see § 1-3-21.

Proceedings to confirm tax title, see § 11-17-1.

Parallel provision, see § 11-25-103.

Rule that three years' occupation under a tax title bars a suit assailing such title, see § 15-1-15.

Redemption of land sold for taxes, see §§ 27-45-3 et seq.

Rights of a purchaser of lands at a tax sale, see § 27-45-27.

JUDICIAL DECISIONS

1. In general.

A tenant who, during his tenancy, obtains a tax title to the leased premises from the tax purchaser is precluded from

asserting the tax title during the continuance of his tenancy, although the tax sale took place prior to his tenancy, but such estoppel is terminated when he surren-

ders possession of the premises to his landlord. *McKay v. Shaffer*, 202 Miss. 558, 32 So. 2d 746 (1947); *James v. Shaffer*, 202 Miss. 565, 32 So. 2d 749 (1947).

The plaintiff in an action under this section [Code 1942, § 1034] is only required to show that he has a tax deed to the property and that the action is brought within the prescribed period of

time; validity of the tax title is not in issue, unless the tax deed is void on its face. *McKay v. Shaffer*, 202 Miss. 558, 32 So. 2d 746 (1947).

Preliminary notice to vacate the premises need not be given tenants of one who was the owner prior to tax sale. *McKay v. Shaffer*, 202 Miss. 558, 32 So. 2d 746 (1947).

RESEARCH REFERENCES

Am Jur. 35 Am. Jur. 2d, Forcible Entry and Detainer §§ 10, 11.

CJS. 36A C.J.S., Forcible Entry and Detainer §§ 21-26.

§ 11-25-5. The complaint.

The party turned out of possession, or held out of possession, may exhibit his complaint before the clerk of the justice court of the county within which the lands, or some part thereof, may lie, to the following effect:

“County of _____, to wit:

“AB, of said county, complains that CD hath unlawfully turned him out of possession (or unlawfully withholds from him the possession) of certain land (here describe it), lying and being in the said county, whereof he prays the possession. AB, Plaintiff.”

The complaint shall be verified by the oath or affirmation of the plaintiff, certified at the foot thereof, after the following manner:

“County of _____, to wit:

“This day the above-named AB made oath (or affirmed) before me, the clerk of the justice court for said county, that the allegations of the above complaint are correct and true.

“Given under my hand, this _____ day of _____, A.D. _____.
_____ EF, Clerk of the Justice Court.”

SOURCES: Codes, *Hutchinson's* 1848, ch. 56, art. 7(4); 1857, ch. 42, art. 4; 1871, § 1583; 1880, § 2646; 1892, § 4462; *Laws*, 1906, § 5041; *Hemingway's* 1917, § 3313; *Laws*, 1930, § 3458; *Laws*, 1942, § 1035; *Laws*, 1982, ch. 423, § 16.

Cross References — Civil jurisdiction of justices of the peace, generally, see § 9-11-9.

Parallel provision, see § 11-25-105.

RESEARCH REFERENCES

Am Jur. 35 Am. Jur. 2d, Forcible Entry and Detainer §§ 38-40.

§ 11-25-7. The warrant.

The clerk of the justice court before whom the complaint is made shall thereupon issue a warrant to the following effect:

"The State of Mississippi

"To the Sheriff of _____ County:

"WHEREAS, AB hath made complaint on oath (or affirmation), before me, the clerk of the justice court for the said county, that CD hath unlawfully turned him out of possession (or unlawfully withholds from him the possession) of certain land (here describe it), lying and being in the said county, and hath prayed the possession thereof, this is therefore to command you to summon the said CD to appear at _____ (which shall be at the usual place of holding the justice court of the justice court judge to whom the case is assigned), on the _____ day of _____, before said justice court judge, to answer to the complaint, and have then there this warrant.

"Witness my hand, this _____ day of _____.

EF, Clerk of the Justice Court"

SOURCES: Codes, Hutchinson's 1848, ch. 56, art. 7(6); 1857, ch. 42, art. 5; 1871, § 1584; 1880, § 2647; 1892, § 4463; Laws, 1906, § 5042; Hemingway's 1917, § 3314; Laws, 1930, § 3459; Laws, 1942, § 1036; Laws, 1981, ch. 471, § 32; Laws, 1982, ch. 423, § 17.

Cross References — Jurisdiction of county courts, generally, see § 9-9-21. Parallel provision, see § 11-25-107.

RESEARCH REFERENCES

Am Jur. 35 Am. Jur. 2d, Forcible Entry and Detainer § 37.

§ 11-25-9. Repealed.

Repealed by Laws, 1982, ch. 423, § 26, eff from and after January 1, 1984, or, with respect to a given county, from and after such earlier date as the county appoints a justice court clerk pursuant to Section 9-11-27(3).

[Codes, 1857, ch. 42, art. 23; 1871, § 1599; 1880, § 2661; 1892, § 4464; 1906, § 5043; Hemingway's 1917, § 3315; 1930, § 3460; 1942, § 1037]

Editor's Note — Former § 11-25-9 provided for the fining of justice for failure to attend proceeding.

§ 11-25-11. How warrant directed and executed.

The warrant shall be directed to the sheriff or any constable of the proper county, as the case may require, and shall be made returnable on a day certain, not less than five (5) days nor more than twenty (20) days after its date, and shall be forthwith executed by the proper officer on the defendant, in the same manner as a summons is required to be served, by delivering a copy, and he shall make due return to the justice court judge to whom the case is assigned, at the time and place therein mentioned, of the manner in which he shall have executed the same.

SOURCES: Codes, Hutchinson's 1848, ch. 56, art. 7(6); 1857, ch. 42, art. 6; 1871, § 1585; 1880, § 2648; 1892, § 4465; Laws, 1906, § 5044; Hemingway's 1917, § 3316; Laws, 1930, § 3461; Laws, 1942, § 1038; Laws, 1982, ch. 423, § 18; Laws, 1986, ch. 459, § 22, eff from and after July 1, 1986.

Cross References — Parallel provision, see § 11-25-109.

RESEARCH REFERENCES

Am Jur. 35 Am. Jur. 2d, Forcible Entry and Detainer § 37.

§ 11-25-13. Witnesses subpoenaed.

At any time after the warrant is issued, the clerk of the justice court or the justice court judge to whom the case is assigned may, upon application of either party, issue subpoenas for witnesses, requiring them to attend court before the justice court judge to whom the case is assigned at the time appointed, to give evidence on the trial.

SOURCES: Codes, Hutchinson's 1848, ch. 56, art. 7(9); 1857, ch. 42, art. 8; 1871, § 1587; 1880, § 2659; 1892, § 4466; Laws, 1906, § 5045; Hemingway's 1917, § 3317; Laws, 1930, § 3462; Laws, 1942, § 1039; Laws, 1982, ch. 423, § 19.

Cross References — Fees of officers and witnesses in unlawful entry and detainer court, see § 25-7-79.

§ 11-25-15. Depositions to be taken.

Depositions may be taken to be read on the trial, in the same manner and under the same circumstances as in cases before justices of the peace.

SOURCES: Codes, 1892, § 4467; Laws, 1906, § 5046; Hemingway's 1917, § 3318; Laws, 1930, § 3463; Laws, 1942, § 1040.

Editor's Note — Pursuant to Miss. Const., § 171, all references in the Mississippi Code to justice of the peace shall mean justice court judge.

§ 11-25-17. The court.

It shall be the duty of the justice court judge to whom the case is assigned, on the days specified, to hold a court for the trial of the complaint. The court shall be considered a court of record. It shall have power to issue alias writs for the defendant, and all proper process to bring before it witnesses or other persons whose attendance may be lawfully required; and may adjourn from day to day and from time to time until the trial shall be ended. The sheriff or constable, as the case may require, shall be attendant upon the court and execute its orders.

SOURCES: Codes, Hutchinson's 1848, ch. 56, art. 7(10); 1857, ch. 42, art. 10; 1871, § 1588; 1880, § 2651; 1892, § 4468; Laws, 1906, § 5047; Hemingway's 1917, § 3319; Laws, 1930, § 3464; Laws, 1942, § 1041; Laws, 1981, ch. 471,

§ 33; Laws, 1982, ch. 423, § 20; Laws, 1986, ch. 459, § 23, eff from and after July 1, 1986.

JUDICIAL DECISIONS

1. In general.

Where a court of unlawful entry and detainer was organized, composed of three justices of the peace, pursuant to a proceeding instituted in that behalf, and they appeared and served without objection, the court acquired jurisdiction of the subject matter, without regard to whether or not the two justices other than the one issuing the process had been summoned in the manner required by law, and the court was vested with authority to render a judgment in the cause. *Amis v. Home Owners' Loan Corp.*, 192 Miss. 309, 5 So. 2d 425 (1942).

The mayor of a municipality, being ex officio a justice of the peace within its territorial limits may participate in the trial of an action of unlawful detainer. *Nickles v. Kendricks*, 73 Miss. 711, 19 So. 582 (1896); *Smith v. Jones*, 65 Miss. 276, 3 So. 740 (1887).

If a defendant summoned in unlawful detainer appear on the return day before the justice who issued the warrant, and consent to a postponement of the case to a

future day, and on the day fixed again appear before the said justice and another, who rendered judgment for the plaintiff, without objection from defendant, the judgment will be valid. *McLemore v. Scales*, 68 Miss. 47, 8 So. 844 (1891).

Where the record shows that judgment was rendered several days after the return day of the writ, it will be presumed, if nothing appear to the contrary, that the court met on the return day and adjourned from day to day until the rendition of the judgment. *Leavenworth v. Crittenden*, 62 Miss. 573 (1885).

The court, when it renders final judgment, is dissolved. It has no power to grant a new trial. *Warren v. Trustees of African Baptist Church*, 50 Miss. 223 (1874).

The special court is, under the power conferred on the legislature to establish such "inferior courts as may be necessary," a constitutional tribunal. *Rabe v. Fyler*, 18 Miss. (10 S. & M.) 440, 48 Am. Dec. 763 (1848).

RESEARCH REFERENCES

Am Jur. 35 Am. Jur. 2d, Forcible Entry and Detainer § 46.

16 Am. Jur. Pl & Pr Forms (Rev), Landlord and Tenant, Form 176.1 (Complaint, petition, or declaration — To recover pos-

session of premises — After statutory notice to quit).

CJS. 36A C.J.S., Forcible Entry and Detainer §§ 80 et seq.

§ 11-25-19. The trial.

If on the day of court and at the place designated, it appears that the defendant has been duly served with the warrant, the justice court judge shall proceed, without further pleadings in writing, to the trial of the complaint.

SOURCES: Codes, *Hutchinson's* 1848, ch. 56, art. 7(10); 1857, ch. 42, art. 11; 1871, § 1589; 1880, § 2652; 1892, § 4469; Laws, 1906, § 5048; *Hemingway's* 1917, § 3320; Laws, 1930, § 3465; Laws, 1942, § 1042; Laws, 1982, ch. 423, § 21.

RESEARCH REFERENCES

Am Jur. 35 Am. Jur. 2d, Forcible Entry and Detainer § 46.

§ 11-25-21. Rent recoverable.

The plaintiff may, on the trial, claim and establish by evidence, any amount due for arrears of rent of the land of which possession is sought, or a reasonable compensation for the use and occupation thereof; and the justice court judge shall find, upon the evidence, the arrears of rent or reasonable compensation, and may give judgment against the defendant in the action for such arrears of rent or reasonable compensation, and award a writ of fieri facias thereon.

SOURCES: Codes, Hutchinson's 1848, ch. 56, art. 16(1); 1857, ch. 42, art. 13; 1871, § 1590; 1880, § 2653; 1892, § 4470; Laws, 1906, § 5049; Hemingway's 1917, § 3321; Laws, 1930, § 3466; Laws, 1942, § 1043; Laws, 1982, ch. 423, § 22.

Cross References — Parallel provision, see § 11-25-111.

When goods upon rented lands are liable to execution, see § 89-7-1.

JUDICIAL DECISIONS

1. In general.

Grantees of a purchaser at a deed of trust foreclosure sale were entitled to maintain an action of unlawful entry and detainer under Code of 1942, § 1033, against the grantors under the deed of trust who remained in, and refused to surrender, possession of the property after the deed of trust was foreclosed, and could recover compensation for the use and occupancy of the property. *Martin v. Leslie*, 229 Miss. 656, 91 So. 2d 743 (1957).

There can be no double rent in the absence of a notice to quit. *McKay v. Shaffer*, 202 Miss. 558, 32 So. 2d 746 (1947).

Judgment may be entered for single rent and also for double rent under Code

1942, § 947. *Firestone Tire & Rubber Co. v. Fried*, 202 Miss. 370, 31 So. 2d 116 (1947), error overruled, 202 Miss. 370, 32 So. 2d 454 (1947).

Judgment for double rent is limited to that which has accrued prior to rendition of judgment. *Stewart v. Miller*, 200 Miss. 188, 26 So. 2d 540 (1946).

Under statute (Code 1942, § 947), allowing recovery of double rent against tenant holding over after notice, double rent may be recovered in an action of unlawful entry and detainer inasmuch as this section [Code 1942, § 1043] provides for the recovery in such an action of "any amount for arrears of rent." *Ellison v. Landry*, 199 Miss. 161, 24 So. 2d 319 (1946).

RESEARCH REFERENCES

Am Jur. 35 Am. Jur. 2d, Forcible Entry and Detainer § 50.

CJS. 36A C.J.S., Forcible Entry and Detainer § 90.

Law Reviews. Ownership of Crops on Foreclosed Land, Priority of After-Acquired Property Clauses in Farm Bankruptcies. 58 Miss. L. J. 481, Winter 1988.

§ 11-25-23. Judgment for plaintiff and writ of possession.

If the finding be for the plaintiff, the justice court judge shall render judgment in favor of the plaintiff that he recover possession of the land, with costs, and shall award a writ of habere facias possessionem; and the justice court judge may issue alias writs and enforce the judgment and punish for

contempt of process thereon; but a writ of habere facias possessionem or execution shall not issue within five (5) days from the date of the judgment.

SOURCES: Codes, Hutchinson's 1848, ch. 56, art. 7(15); 1857, ch. 42, art. 16; 1871, § 1591; 1880, § 2654; 1892, § 4471; Laws, 1906, § 5050; Hemingway's 1917, § 3322; Laws, 1930, § 3467; Laws, 1942, § 1044; Laws, 1982, ch. 423, § 23.

Cross References — Parallel provision, see § 11-25-113.

Form of judgment for person claiming possession of the premises, see § 89-7-41.

Record of the proceedings, and appeals, see § 89-7-47.

RESEARCH REFERENCES

Am Jur. 35 Am. Jur. 2d, Forcible Entry and Detainer §§ 47, 53.

12 Am. Jur. Pl & Pr Forms (Rev), Forcible Entry and Detainer, Forms 61-64, 69-71 (Judgments; writs of restitution or execution).

21 Am. Jur. Proof of Facts 2d 567, Forcible Entry and Detainer: Requisite Right, Title or Possession of Plaintiff.

CJS. 36A C.J.S., Forcible Entry and Detainer §§ 85 et seq.

§ 11-25-25. Growing crops.

In case of forfeiture under contract of purchase, the purchaser, and in case of foreclosure of deeds in trust or mortgages, the mortgagor shall be entitled to cultivate and gather the crops, if any, planted by him and grown or growing on the premises at the time of the commencement of the suit; and shall, after eviction therefrom have the right to enter thereon for the purpose of completing the cultivation and removing the crops, first paying or tendering to the party entitled to the possession a reasonable compensation for the use of the land. The court may, on demand of the defendant, adjudge the sum to be paid or tendered.

SOURCES: Codes, 1892, § 4472; Laws, 1906, § 5051; Hemingway's 1917, § 3323; Laws, 1930, § 3468; Laws, 1942, § 1045.

Cross References — Rule that a growing crop is not subject to judgment lien, see § 11-7-199.

Parallel provision, see § 11-25-115.

Rule that a growing crop shall not be levied upon or attached, see § 13-3-137.

Growing crops on decedent's estate, see § 91-7-169.

JUDICIAL DECISIONS

1. In general.

This section and Section 11-25-115, allowing mortgagor to cultivate and gather crops after foreclosure if crops were planted and growing at time of commence-

ment of foreclosure suit, do not require that mortgagee commence action for unlawful entry and detainer. In re Hilburn, 62 B.R. 597 (Bankr. N.D. Miss. 1986).

RESEARCH REFERENCES

Law Reviews. Ownership of Crops on Foreclosed Land, Priority of After-Acquired Property Clauses in Farm Bankruptcies. 58 Miss. L. J. 481, Winter 1988.

§ 11-25-27. Judgment for defendant for costs.

If the finding be in favor of the defendant, the justices shall render judgment against the plaintiff that his complaint be dismissed, and the defendant recover of him full costs. The judgment of the justices, either in favor of the plaintiff or the defendant, shall be executed in the same manner as the judgment of any other court of record.

SOURCES: Codes, Hutchinson's 1848, ch. 56, art. 7(15); 1857, ch. 42, art. 17; 1871, § 1592; 1880, § 2655; 1892, § 4473; Laws, 1906, § 5052; Hemingway's 1917, § 3324; Laws, 1930, § 3469; Laws, 1942, § 1046.

Editor's Note — Pursuant to Miss. Const., Art. 6, § 171, all references in the Mississippi Code to justice of the peace shall mean justice court judge.

Cross References — Parallel provision, see § 11-25-117.

RESEARCH REFERENCES

Am Jur. 35 Am. Jur. 2d, Forcible Entry and Detainer §§ 47, 52.

12 Am. Jur. Pl & Pr Forms (Rev), Forcible Entry and Detainer, Forms 65-66 (Judgment for defendant).

21 Am. Jur. Proof of Facts 2d 607, Forcible Entry and Detainer: Requisite Force by Defendant.

CJS. 36A C.J.S., Forcible Entry and Detainer § 91.

§ 11-25-29. Repealed.

Repealed by Laws, 1982, ch. 423, § 26, eff from and after January 1, 1984, or, with respect to a given county, from and after such earlier date as the county appoints a justice court clerk pursuant to Section 9-11-27(3).

[Codes, 1871, § 1593; 1880, § 2656; 1892, § 4474; 1906, § 5053; Hemingway's 1917, § 3325; 1930, § 3470; 1942, § 1047]

Editor's Note — Former § 11-25-29 specified that if the court was composed of two justices only, and they disagreed, the decision of the justice before whom the complaint was made would be the judgment of the court.

§ 11-25-31. Judgment not conclusive in another action.

A judgment rendered in a suit of unlawful entry or detainer, either for the plaintiff or defendant, shall not bar any action in the circuit court between the same parties, respecting the same land; nor shall any judgment given therein be held conclusive of the facts found in any other action between the same parties.

SOURCES: Codes, Hutchinson's 1848, ch. 56, art. 7(15); 1857, ch. 42, art. 22; 1871, § 1598; 1880, § 2660; 1892, § 4475; Laws, 1906, § 5054; Hemingway's 1917, § 3326; Laws, 1930, § 3471; Laws, 1942, § 1048.

Cross References — Parallel provision, see § 11-25-119.

JUDICIAL DECISIONS

1. In general.

In a proceeding in unlawful entry and detainer to obtain possession of house and lot, title deeds are admissible to prove the right and extent of possession, even though the suit is a possessory action and determination of title is not involved and

any purely equitable defenses that defendant may have had could not have been presented in this action, but the judgment shall not bar any action in Circuit Court between the same parties respecting the same land. *Tate v. Tate*, 217 Miss. 734, 64 So. 2d 908 (1953).

RESEARCH REFERENCES

Am Jur. 35 Am. Jur. 2d, Forcible Entry and Detainer § 49.

CJS. 36A C.J.S., Forcible Entry and Detainer § 88.

ARTICLE 3.

PROCEEDINGS IN COUNTY COURT.

SEC.

- 11-25-101. County court; remedy in what cases.
- 11-25-103. Purchaser of tax lands.
- 11-25-105. Court — complaint — form.
- 11-25-107. Warrant.
- 11-25-109. Execution of warrant.
- 11-25-111. Rent.
- 11-25-113. Judgment for plaintiff.
- 11-25-115. Growing crops.
- 11-25-117. Judgment for defendant.
- 11-25-119. Judgment not bar.

§ 11-25-101. County court; remedy in what cases.

Any one deprived of the possession of land by force, intimidation, fraud, stratagem, stealth, and any landlord, vendor, vendee, mortgagee, or trustee, or cestui que trust, or other person against whom the possession of land is withheld, by his tenant, vendee, vendor, mortgagor, grantor, or other person, after the expiration of his right by contract, express or implied, to hold possession, and the legal representatives or assigns of him who is so deprived of possession, or from whom possession is so withheld, as against him who so obtained possession, or withholds possession after the expiration of his right, and all persons claiming to hold under him, shall, at any time within one year after such deprivation or withholding of possession, be entitled to the summary remedy herein prescribed.

SOURCES: Codes, 1942, § 1049; Laws, 1934, ch. 234; Laws, 1936, ch. 246.

Cross References — Provision granting exclusive jurisdiction of unlawful entry and detainer proceedings to county courts, see § 9-9-21.

Actions in ejectment, see § 11-19-1.

Parallel provision, see § 11-25-1.

Appeal in cases of unlawful entry and detainer, see § 11-51-83.

Limitation of actions concerning land, see § 15-1-7.

Rule that right of entry is not tolled by death of disseizor, see § 89-1-19.

JUDICIAL DECISIONS

1. In general.
2. By whom maintainable.
3. Against whom maintainable.
4. Conditions precedent to right to bring action.
5. Character of entry or detainer as forcible.
6. Time for bringing action.
7. Defenses.
8. Miscellaneous.

1. In general.

Title is not primarily involved in an action of unlawful entry and detainer, the action being possessory only, and all that the plaintiff is required to show in such an action is that he brings himself strictly within the terms of the statute which allows the action to him. *McKay v. Shaffer*, 202 Miss. 558, 32 So. 2d 746 (1947).

The action of unlawful entry and detainer is statutory, and the statutes authorizing the remedy are strictly construed, because they are in derogation of the common law. *Sistrunk v. Majure*, 186 Miss. 814, 192 So. 5 (1939).

Purchaser at foreclosure sale, held not authorized to maintain unlawful entry and detainer against one in possession claiming fee simple title by parol gift followed by adverse possession. *Holmes v. Elmer*, 182 Miss. 171, 181 So. 325 (1938).

Action for unlawful entry and detainer is possessory and does not adjudicate title as such; in action for unlawful entry and detainer, title deeds are admissible to prove right and extent of possession. *McCallum v. Gavin*, 149 Miss. 885, 116 So. 94 (1928).

In unlawful entry and detainer cases, it is essential, and the burden of proof is on the complaining party to show that the defendant unlawfully withholds possession of the land in controversy. *Murf v. Maupin*, 113 Miss. 670, 74 So. 614 (1917); *Sistrunk v. Majure*, 186 Miss. 814, 192 So. 5 (1939).

Defendant must be in possession before plaintiff can maintain action against him.

Walton v. Wall, 110 Miss. 361, 70 So. 549 (1916).

Possession of plaintiff at the time of alleged entry is necessary to sustain this action. *Taylor v. Orlansky*, 92 Miss. 761, 46 So. 50 (1908), error overruled, 92 Miss. 764, 46 So. 136 (1908).

The plaintiff must have been deprived of possession in order to sustain the action. *Robinson v. Boggan*, 97 Miss. 27, 52 So. 705 (1907).

The action of unlawful entry and detainer is confined to cases specified in the foregoing, this and the section following [Code 1942, §§ 1049, 1050]. *Home Mut. Bldg. & Loan Ass'n v. Leonard*, 77 Miss. 39, 25 So. 351 (1899); *Owen v. Monroe County Alliance*, 77 Miss. 500, 27 So. 383 (1899).

The action is merely possessory, and does not involve title. *Spears v. McKay*, 1 Miss. (1 Walker) 265 (1827); *Loring v. Willis*, 5 Miss. (4 Howard) 383 (1840); *Clark v. Bourgeois*, 36 Miss. 1, 38 So. 187 (1905); *Paden v. Gibbs*, 88 Miss. 274, 40 So. 871 (1906).

2. By whom maintainable.

Grantees of a purchaser at a deed of trust foreclosure sale were entitled to maintain an action of unlawful entry and detainer under Code 1942, § 1033, against the grantors under the deed of trust who remained in, and refused to surrender, possession of the property after the deed of trust was foreclosed, and could recover compensation for the use and occupancy of the property. *Martin v. Leslie*, 229 Miss. 656, 91 So. 2d 743 (1957).

A proceeding in unlawful entry and detainer to obtain possession of house and lot is a summary remedy, and may be brought by an owner whose possession is merely constructive. *Tate v. Tate*, 217 Miss. 734, 64 So. 2d 908 (1953).

Action of unlawful detainer is purely possessory and does not involve title, so that landlord could not maintain such

action against lessee and sublessee after expiration of such leases where the landlord had leased all the premises to another who had been and was in possession of part of the premises, notwithstanding provision in the latter lease that exclusive possession would be given to lessee as of the date of the beginning of the lease, since such provision did not constitute an undertaking on the part of the landlord to put the lessee into possession. *Ward v. Hudson*, 199 Miss. 171, 24 So. 2d 329 (1946).

Grantee of landlord who had months before served notice to vacate on tenant, who went into possession under rental contract requiring him to vacate on fifteen days' notice, unless tenant paid rent in arrears, could maintain unlawful entry and detainer proceeding against tenant, who failed to pay rent, as an "assign" of landlord, although grantee had never been in possession. *Williams v. Johnson*, 175 Miss. 419, 167 So. 639 (1936).

Statute authorizing summary remedy against wrongful possession of land gives remedy to one claiming under deed of trust or mortgage, although not immediate vendee or vendee under original grantor in deed of trust. *Citizens' Bank v. Grigsby*, 170 Miss. 655, 155 So. 684 (1934).

A landlord who has leased his land for a term and places his tenant in possession, cannot during the term maintain an action of unlawful entry and detainer under this section [Code 1942, § 1049] against a stranger who entered upon a part of the premises after the term began. *Hammel v. Atkinson*, 82 Miss. 465, 34 So. 225 (1903).

A railroad exercising ownership over that part of its right of way not occupied by its track in the usual way, such as the nature of the property permitted, has such possession of such part of its right of way as authorizes this action against wrongful entry thereon. *Sproule v. Alabama & V. Ry.*, 78 Miss. 88, 29 So. 163 (1901).

This action can be brought only in the cases specified in the statute. One whose title is equitable purely, and who has never been in possession and who has no contract with the occupant, express or implied, as to possession, cannot maintain the action. *Owen v. Monroe County Alliance*, 77 Miss. 500, 27 So. 383 (1899).

Under this section a purchaser at an execution sale can maintain this action against a tenant of the defendant in execution who withholds possession after his right, the purchaser having become by operation of law the assignee of him who was deprived of possession, or from whom possession was so withheld. This section [Code 1942, § 1049] covers assignees by operation of law as well as by contract. *Glenn v. Caldwell*, 74 Miss. 49, 20 So. 152 (1896).

A purchaser of land who has been in peaceable possession for six years claiming to a certain fence, the true boundary of the enclosed lot being in dispute, is an assign of such person, within the meaning of this section [Code 1942, § 1047] and may bring this action against the adjoining lot owner who forcibly moved the fence back and took possession of a strip of land, though plaintiff got his deed after such removal. *Young v. Barr*, 69 Miss. 879, 13 So. 816 (1892).

Owners of the reversion cannot, after the death of the tenant by the courtesy, maintain the action against his lessee. There is no privity between them. *Wolfe v. Angvine*, 57 Miss. 767 (1880).

If a vendor who has given bond for title part with the purchase-money notes and the legal title to the land, he cannot maintain the action. *Clymer v. Powell*, 56 Miss. 672 (1879).

One who filed a homestead entry on public lands of the United States cannot maintain the action against persons who had wrongfully settled on the land when "public." *McCorkle v. Yarrell*, 55 Miss. 576 (1878).

An owner whose possession is merely constructive can maintain the action. *Wilson v. Pugh*, 32 Miss. 196 (1856).

An action does not lie in favor of a purchaser at sheriff's sale to recover from one who was not liable to the action at the suit of the defendant in execution. *Cummings v. Kilpatrick*, 23 Miss. 106 (1851).

Where joint tenants are entitled to the action, it may be brought by one alone. *Rabe v. Fyler*, 18 Miss. (10 S. & M.) 440, 48 Am. Dec. 763 (1848).

3. Against whom maintainable.

The action under this section [Code 1942, § 1049] being possessory only, does

not lie against one who has entered under a lease valid for a year and holds under a contract enforceable in equity against the plaintiff as a lease for a longer period. *Lobdell v. Mason*, 71 Miss. 937, 15 So. 44 (1894).

Where one claiming invades the possession of another and seeks by stratagem or device to secure the possession to himself, the statute applies. *Parker v. Eason*, 68 Miss. 290, 8 So. 844 (1891).

A "scrambling possession" is not sufficient. *Benjamin v. Reach*, 65 Miss. 347, 3 So. 657 (1887); *Blake v. McCroy*, 65 Miss. 443, 4 So. 339 (1888).

Where a party goes into possession under an executory agreement to purchase, by refusal to pay the balance due on the purchase-money he from that time becomes a trespasser and the vendor may bring the action against him, having first put defendant in default and asserted the right to end the contract. *Loring v. Willis*, 5 Miss. (4 Howard) 383 (1840); *Johnson v. Tuggle*, 27 Miss. 836 (1854); *Moak v. Bryant*, 51 Miss. 560 (1875).

4. Conditions precedent to right to bring action.

The vendor of land must tender deed before he can bring this action. *Bowling v. Bowling*, 47 So. 802 (Miss. 1908).

If the tenant disclaim the tenancy, or if the defendant dispute plaintiff's right to the possession, a demand is unnecessary before suit. The question of demand is one of costs only. *Rabe v. Fyler*, 18 Miss. (10 S. & M.) 440, 48 Am. Dec. 763 (1848).

5. Character of entry or detainer as forcible.

A mere entry on land against the will of the occupant without other force, intimidation or fraud is sufficient. *Clark v. Bourgeois*, 86 Miss. 1, 38 So. 187 (1905).

Where a defendant entered into the possession of land, the record title to which was in the plaintiff, under a verbal contract to make payments to the plaintiff in the nature of rent until a certain sum had been paid, when plaintiff was to make defendant a deed, and before completing the payments the defendant repudiated the contract, the action of unlawful detainer will lie in plaintiff's favor. *Clark v. Bourgeois*, 86 Miss. 1, 38 So. 187 (1905).

An entry upon the land of a person in possession, however quietly made, is forcible within the meaning of this section [Code 1942, § 1049]. *Seals v. Williams*, 80 Miss. 234, 31 So. 707, 92 Am. St. R. 601 (1902).

The owner whose possession is merely constructive can maintain the action against one who enters on it without his consent, even if the entry be peaceable. *Wilson v. Pugh*, 32 Miss. 196 (1856).

6. Time for bringing action.

Where the record justifies a finding that defendant's possession was permissive until one month before the action was brought, it is not barred by this section [Code 1942, § 1049]. *Ellis v. Knight*, 239 Miss. 836, 124 So. 2d 694 (1960).

Tenant claiming that unlawful entry and detainer proceeding was barred because not brought within one year after wrongful deprivation or withholding of possession had burden of proving when his possession became adverse. *Holmes v. Elmer*, 182 Miss. 171, 181 So. 325 (1938).

Mortgagee which had foreclosed deed of trust and received trustee's deed to property in 1933 held not entitled to maintain suit for unlawful entry and detainer in 1936, where there was no contract between mortgagors and mortgagee after foreclosure and mortgagors remained in possession until after institution of suit in 1936. *Anthony v. Bank of Wiggins*, 178 Miss. 361, 173 So. 454 (1937).

One-year limitation on unlawful entry and detainer did not begin to run when tenant went into possession under contract requiring him to vacate on fifteen days' notice, but only fifteen days after tenant received notice to vacate. *Williams v. Johnson*, 175 Miss. 419, 167 So. 639 (1936).

This action must be brought within one year after right accrues. *Robinson v. Boggan*, 97 Miss. 27, 52 So. 705 (1907).

7. Defenses.

Pendency of attachment against grantor of plaintiff in unlawful entry and detainer proceeding, sued out by defendant and levied on land in controversy, constituted no defense to unlawful entry and detainer proceeding. *Williams v.*

Johnson, 175 Miss. 419, 167 So. 639 (1936).

Invalidity of trust deed on which plaintiff, in unlawful entry and detainer, based his claim, held available defense, though such action is possessory and title is not involved. *Gardner v. Cook*, 173 Miss. 244, 158 So. 150 (1934).

In such an action neither the legal title of the property nor any secret equities existing between the parties may be investigated. *Clark v. Bourgeois*, 86 Miss. 1, 38 So. 187 (1905).

Purely equitable defenses cannot be presented in this action. *Home Mut. Bldg. & Loan Ass'n v. Leonard*, 77 Miss. 39, 25 So. 351 (1899).

Where a plaintiff claims through a sale under a trust deed defendant can defeat recovery by showing that he gave plaintiff the trust deed to secure a debt contracted with him while he was conducting business as a merchant without having paid a sufficient privilege tax. *Williams v. Simpson*, 70 Miss. 113, 11 So. 689 (1892).

The defendant in such case need not pay or tender the amount due as he would be required to do on seeking affirmative relief in equity. *Williams v. Simpson*, 70 Miss. 113, 11 So. 689 (1892).

Defendant cannot defeat the suit by abandoning possession after action begun. *Newman v. Mackin*, 21 Miss. (13 S. & M.) 383 (1850).

8. Miscellaneous.

Our invoking this statute has the burden of proving when his possession became adverse. *Ellis v. Knight*, 239 Miss. 836, 124 So. 2d 694 (1960).

In an action of unlawful entry and detainer the record must be so certain that the sheriff could go to the land from the description there to be seen and he could not act on inquiry dehors the record. *Price v. Moss*, 214 Miss. 253, 58 So. 2d 661 (1952).

In an unlawful entry and detainer action where the judgment described the land as fractional part of the N. E. one-fourth of section 36, township 7, range 4 west, containing 75 acres more or less, the description of property is void for indefiniteness and uncertainty. *Price v. Moss*, 214 Miss. 253, 58 So. 2d 661 (1952).

The mere fact that the plaintiff in an action for unlawful entry and detainer has an outstanding muniment of title is not proof that the defendant holds possession of the land unlawfully, and where there is no evidence to show that defendant was wrongfully withholding possession of the property in controversy, an action of unlawful entry and detainer cannot be sustained. *Sistrunk v. Majure*, 186 Miss. 814, 192 So. 5 (1939).

Evidence held not to sustain plaintiff's right to maintain unlawful entry and detainer for possession of filling station and for rent. *Coman v. Jourdan*, 181 Miss. 674, 180 So. 792 (1938).

Affidavit to complaint by attorney reciting that allegations of complaint were correct and true, held not objectionable for failure to disclose facts were within personal knowledge of affiant. *Huff v. Murray*, 171 Miss. 656, 158 So. 475 (1935).

Where warrant issued on complaint for unlawful entry and detainer complied with statute which merely required that warrant should be made returnable on day certain, not less than five days nor more than twenty days after its date, defendants could not object to being put to trial in present term of court on ground that process had not been issued and served more than five days prior to present term. *Huff v. Murray*, 171 Miss. 656, 158 So. 475 (1935).

Appearance of defendants and their participation in trial of action of unlawful entry and detainer held an admission, in absence of evidence to contrary, that they were withholding land from plaintiff. *Huff v. Murray*, 171 Miss. 656, 158 So. 475 (1935).

In action of unlawful entry and detainer, deed to plaintiff, in absence of evidence to contrary, constituted sufficient evidence of plaintiff's right to possession of land, since recitals in deed were prima facie correct. *Huff v. Murray*, 171 Miss. 656, 158 So. 475 (1935).

Complaint in action of unlawful entry and detainer reciting that named person, by his attorney, complains that named persons unlawfully withhold from him possession of lands, held not subject to objection that complaint disclosed that possession was withheld from attorney

and not client. *Huff v. Murray*, 171 Miss. 656, 158 So. 475 (1935).

In action of unlawful entry and detainer where deed to plaintiff had been executed before institution of suit, whether deed was recorded before filing of complaint held immaterial as respects right of plaintiff to introduce deed in evidence. *Huff v. Murray*, 171 Miss. 656, 158 So. 475 (1935).

In action of unlawful entry and detainer, introduction of deed to plaintiff held not objectionable on ground copy of deed not filed with declaration. *Huff v. Murray*, 171 Miss. 656, 158 So. 475 (1935).

Evidence as to value of land in action of unlawful entry and detainer, consisting only of recital in trustee's deed of amount bid by plaintiff at sale, held insufficient to

permit Supreme Court to assess damages on appeal. *Huff v. Murray*, 171 Miss. 656, 158 So. 475 (1935).

Title deeds competent evidence to show right of possession. Where possession is denied by defendant burden is on plaintiff to show specific property in possession of defendant. *Murf v. Maupin*, 113 Miss. 670, 74 So. 614 (1917).

It is competent for the landlord to show in action of unlawful detainer against his tenant refusing to pay rent that the eviction from a part of the premises, of which the tenant complains, was under a mortgage on such part, of which the tenant had knowledge when taking the lease. *Cheairs v. Coats*, 77 Miss. 846, 28 So. 728, 78 Am. St. R. 546 (1900).

RESEARCH REFERENCES

ALR. Remedy of tenant against stranger wrongfully interfering with his possession. 12 A.L.R.2d 1192.

Right of landlord legally entitled to possession to dispossess tenant without legal process. 6 A.L.R.3d 177.

Am Jur. 35 Am. Jur. 2d, Forcible Entry

and Detainer §§ 10, 11.

CJS. 36A C.J.S., Forcible Entry and Detainer §§ 21-26.

Law Reviews. Ownership of Crops on Foreclosed Land, Priority of After-Acquired Property Clauses in Farm Bankruptcies. 58 Miss. L. J. 481, Winter 1988.

§ 11-25-103. Purchaser of tax lands.

The purchaser of land at a sale for taxes, or his vendee, after two years from the date of the sale for taxes, and within three years from such date, may bring the action of unlawful detainer, for the recovery or possession of the land; and a judgment in his favor in the action shall be a bar to any action in any court brought after one year from the date of such judgment, to controvert the tax title to the land, saving the rights of infants and persons of unsound mind to redeem the same.

SOURCES: Codes, 1942, § 1050; Laws, 1934, ch. 234; Laws, 1936, ch. 246.

Cross References — Definition of the term "infant", see § 1-3-21.

Proceedings to confirm tax title, see § 11-17-1.

Parallel provision, see § 11-25-3.

Rule that three year's occupation under a tax title bars a suit assailing such title, see § 15-1-15.

Redemption of land sold for taxes, see §§ 27-45-3 et seq.

Rights of a purchaser of lands at a tax sale, see § 27-45-27.

JUDICIAL DECISIONS

1. In general.

The action of unlawful entry and detainer is statutory, and the statutes au-

thorizing the remedy are strictly construed, because they are in derogation of the common law. *Sistrunk v. Majure*, 186

Miss. 814, 192 So. 5 (1939).

In an action under this section [Code 1942, § 1050], the action being purely possessory, inquiry as to the condition of the title at the time of sale is immaterial. Foote v. Dismukes, 71 Miss. 110, 13 So. 879 (1893).

It is no defense that the title was not in the defendant, but in his minor children entitled to redeem. Foote v. Dismukes, 71 Miss. 110, 13 So. 879 (1893).

The section [Code 1942, § 1050] applies

alike to all sales of land for taxes, and precludes controversy, whatever may be the ground for assailing the title. McLemore v. Scales, 68 Miss. 47, 8 So. 844 (1891); Home Mut. Bldg. & Loan Ass'n v. Leonard, 77 Miss. 39, 25 So. 351 (1899); Owen v. Monroe County Alliance, 77 Miss. 500, 27 So. 383 (1899).

The state and its vendee can bring the action to recover on a tax-title. Crittenden v. Leavenworth, 62 Miss. 32 (1884).

RESEARCH REFERENCES

Am Jur. 35 Am. Jur. 2d, Forcible Entry and Detainer §§ 10, 11.

CJS. 36A C.J.S., Forcible Entry and Detainer §§ 21-26.

§ 11-25-105. Court — complaint — form.

The party turned out of possession, or held out of possession, may exhibit his complaint before the judge or clerk of the county court of the county within which the lands, or some part thereof, may lie, to the following effect:

“County of _____, to-wit:

“AB, of said county, complains that CD hath unlawfully turned him out of possession (or unlawfully withholds from him the possession) of certain land (here describe it), lying and being in the said county, whereof he prays the possession.

“AB, Plaintiff.”

The complaint shall be verified by the oath or affirmation of the plaintiff, certified at the foot hereof, after the following manner:

“County of _____, to-wit:

“This day the above-named AB made oath (or affirmed) before me, _____ of the county court for said county, that the allegations of the above complaint are correct and true.

“Given under my hand, this _____ day of _____ A. D. _____.

“EF, _____ of the County Court.”

SOURCES: Codes, 1942, § 1051; Laws, 1934, ch. 234; Laws, 1936, ch. 246.

Cross References — Civil jurisdiction of justices of the peace generally, see § 9-11-9.

Parallel provision, see § 11-25-5.

JUDICIAL DECISIONS

1. In general.

It is not essential to jurisdiction that an affidavit in an unlawful entry and detainer proceeding be made before a justice of the peace of the county in which the

lands lie, since the word “may” as used in the statute, is not used in the mandatory sense. Gee v. Rimmer, 188 Miss. 460, 195 So. 342 (1940).

Under statute, on filing of complaint

cause is at issue without further pleading, and pleas, replications, rejoinders, surrejoinders, and demurrers are improper. *Holmes v. Elmer*, 182 Miss. 171, 181 So. 325 (1938).

In action of unlawful entry and detainer, introduction of deed to plaintiff held not objectionable on ground copy of deed not filed with declaration. *Huff v. Murray*, 171 Miss. 656, 158 So. 475 (1935).

Invalidity of trust deed, on which plaintiff in unlawful entry and detainer action based his claim, held available defense, though such action is possessory only and title is not involved. *Gardner v. Cook*, 173 Miss. 244, 158 So. 150 (1934).

Rent is recoverable as an incident to the suit although affidavit does not demand rent. *Stollenwerck v. Eure*, 120 Miss. 233, 82 So. 68 (1919).

The land sued for must be described with sufficient accuracy to enable an officer under proper process, should a judgment be rendered for the plaintiff, to remove defendant therefrom without the aid of inquiry dehors the record. *Paden v. Gibbs*, 88 Miss. 274, 40 So. 871 (1906).

A complaint is not bad for duplicity because it avers an unlawful "turning out" and an "unlawful withholding." If a complaint should be doubled, it could be amended. *Brown v. Ashford*, 56 Miss. 677 (1879).

If the name of the affiant be omitted from the affidavit, it may be corrected by amendment. *Johnson v. Tuggle*, 27 Miss. 836 (1854).

A complaint in the language of the statute is sufficient. *Torrey v. Cook*, 11 Miss. (3 S. & M.) 60 (1844).

RESEARCH REFERENCES

Am Jur. 35 Am. Jur. 2d, Forcible Entry and Detainer §§ 38-40.

CJS. 36A C.J.S., Forcible Entry and Detainer §§ 49-62.

§ 11-25-107. Warrant.

The county judge or the clerk of the county court upon the filing of the complaint shall thereupon issue a warrant to the following effect:

"The State of Mississippi.

"To the Sheriff of _____ County:

"Whereas, AB hath made complaint, on oath (or affirmation), before me, _____ of the county court for the said county, that CD hath unlawfully turned him out of possession (or unlawfully withholds from him the possession) of certain land (here describe it), lying and being in the said county, and hath prayed the possession thereof, this is therefore to command you to summon the said CD to appear at _____ (which shall be at the usual place of holding the county court), on the _____ day of _____, before the county court, to answer to the complaint.

"Witness my hand, this _____ day of _____.

"EF, _____ of the County Court."

SOURCES: Codes, 1942, § 1052; Laws, 1934, ch. 234; Laws, 1936, ch. 246.

Cross References — Jurisdiction of county courts, generally, see § 9-9-21.
Parallel provision, see § 11-25-7.

JUDICIAL DECISIONS

1. In general.

The warrant is not defective because it does not state that the place at which defendant is required to appear is the

“usual place of holding the justice’s court in the district.” *Brown v. Ashford*, 56 Miss. 677 (1879).

RESEARCH REFERENCES

Am Jur. 35 Am. Jur. 2d, Forcible Entry and Detainer § 37.

CJS. 36A C.J.S., Forcible Entry and Detainer § 41.

§ 11-25-109. Execution of warrant.

The warrant shall be directed to the sheriff, or any constable of the county, and shall be made returnable to the first term of the county court held after the issuance of the said warrant, unless it shall be issued more than ten days before the said term of court when it may be made returnable before the judge of the county court at the usual place of holding the county court at a day to be named not more than ten days, or less than five days, after the date of issuance of the said warrant; and the cause shall be triable at such term, or before the judge in vacation, (if so returnable), on the day therein, provided the defendant has been served with process at least five days before the return day of writ.

SOURCES: Codes, 1942, § 1053; Laws, 1934, ch. 234; Laws, 1936, ch. 246.

Cross References — Parallel provision, see § 11-25-11.

JUDICIAL DECISIONS

1. In general.

Where warrant issued on complaint unlawful entry and detainer complied with statute which merely required that warrant should be made returnable on day certain, not less than five days nor more than twenty days after its date, defendants could not object to being put to trial in present term of court on ground that

process had not been issued and served more than five days prior to present term. *Huff v. Murray*, 171 Miss. 656, 158 So. 475 (1935).

Appearance and motion to quash process constitute sufficient appearance regardless of validity of original summons. *Citizens’ Bank v. Grigsby*, 170 Miss. 655, 155 So. 684 (1934).

RESEARCH REFERENCES

Am Jur. 35 Am. Jur. 2d, Forcible Entry and Detainer § 37.

CJS. 36A C.J.S., Forcible Entry and Detainer § 41.

§ 11-25-111. Rent.

The plaintiff may, on the trial, claim and establish by evidence, any amount due for arrears of rent on the land of which possession is sought, or a reasonable compensation for the use and occupation thereof; and the judge of the county court, shall find upon the evidence the arrears of rent or reasonable compensation and the judge of the county court may give judgment against the

defendant in the action for such arrears of rent or reasonable compensation and may award a writ of fieri facias thereon. All such cases shall be tried by the judge without the intervention of the jury.

SOURCES: Codes, 1942, § 1054; Laws, 1934, ch. 234; Laws, 1936, ch. 246.

Cross References — Parallel provision, see § 11-25-21.

When goods upon rented lands are liable to execution, see § 89-7-1.

JUDICIAL DECISIONS

1. In general.

This section [Code 1942, § 1054], providing that judge shall find upon evidence the arrears of rent or reasonable compensation, and Code 1942, § 947, allowing double rent against a tenant holding over after notice, are applicable to suits in unlawful entry and detainer. *Burr v. Johnson*, 204 Miss. 479, 37 So. 2d 747 (1948), error overruled 204 Miss. 479, 38 So. 2d 314.

In unlawful entry and detainer action against tenant holding over, imposition of damages at double rent cannot be awarded on testimony which is too vague to establish a rental basis, especially in view of penal nature of such award. *Burr*

v. Johnson, 204 Miss. 479, 37 So. 2d 747 (1948), error overruled 204 Miss. 479, 38 So. 2d 314.

Judgment for double rent is limited to that which has accrued prior to rendition of judgment. *Stewart v. Miller*, 200 Miss. 188, 26 So. 2d 540 (1946).

Under statute (Code 1942, § 947), allowing recovery of double rent against tenant holding over after notice, double rent may be recovered in an action of unlawful entry and detainer inasmuch as this section [Code 1942, § 1054] provides for the recovery in such an action of "any amount for arrears of rent." *Ellison v. Landry*, 199 Miss. 161, 24 So. 2d 319 (1946).

RESEARCH REFERENCES

Am Jur. 35 Am. Jur. 2d, Forcible Entry and Detainer § 50.

CJS. 36A C.J.S., Forcible Entry and Detainer § 72.

Law Reviews. Ownership of Crops on Foreclosed Land, Priority of After-Acquired Property Clauses in Farm Bankruptcies. 58 Miss. L. J. 481, Winter 1988.

§ 11-25-113. Judgment for plaintiff.

If the finding be for the plaintiff, the judge of the county court shall render judgment in favor of the plaintiff, that he recover possession of the land, with costs, and shall award a writ of habere facias possessionem, and said judge may issue alias writs and enforce the judgment and may punish for contempt of process thereon; provided, however, that a writ of habere facias possessionem or execution shall not issue within five days from the date of judgment.

SOURCES: Codes, 1942, § 1055; Laws, 1934, ch. 234; Laws, 1936, ch. 246.

Cross References — Parallel provision, see § 11-25-23.

Form of judgment for person claiming possession of the premises, see § 89-7-41.

Record of the proceedings, and appeals, see § 89-7-47.

JUDICIAL DECISIONS

1. In general.

The judgment must describe the property. *Murf v. Maupin*, 113 Miss. 670, 74 So. 614 (1917).

Where plaintiff claims compensation for use and occupation a mere surrender of possession by defendant will not authorize dismissal of appeal. *Cahn v. Wright*, 108 Miss. 324A, 66 So. 782 (1914).

A purchaser from the state, who brings the action on a tax title, can recover reasonable compensation for the use and occupation of the premises. *Leavenworth v. Crittenden*, 62 Miss. 573 (1885).

The plaintiff, when too much rent has been awarded him, may remit the excess and thus prevent a new trial. *Newman v. Mackin*, 21 Miss. (13 S. & M.) 383 (1850).

RESEARCH REFERENCES

Am Jur. 35 Am. Jur. 2d, Forcible Entry and Detainer §§ 47, 53.

12 Am. Jur. Pl & Pr Forms (Rev), Forcible Entry and Detainer, Forms 61-64,

69-71 (Judgments; writs of restitution or execution).

CJS. 36A C.J.S., Forcible Entry and Detainer §§ 85 et seq.

§ 11-25-115. Growing crops.

In case of forfeiture under contract of purchase, the purchaser, and in case of foreclosure of deeds in trust or mortgages, the mortgagor shall be entitled to cultivate and gather the crops, if any, planted by him and grown or growing on the premises at the time of the commencement of the suit; and shall, after eviction therefrom have the right to enter thereon for the purpose of completing the cultivation and removing the crops, first paying or tendering to the party entitled to the possession a reasonable compensation for the use of the land. The court may, on demand of the defendant, adjudge the sum to be paid or tendered.

SOURCES: Codes, 1942, § 1056; Laws, 1934, ch. 234; Laws, 1936, ch. 246.

Cross References — Rule that a growing crop is not subject to judgment lien, see § 11-7-199.

Parallel provision, see § 11-25-25.

Rule that a growing crop shall not be levied upon or attached, see § 13-3-137.

Growing crops on a decedent's estate, see § 91-7-169.

JUDICIAL DECISIONS

1. In general.

This section and Section 11-25-15, allowing mortgagor to cultivate and gather crops after foreclosure if crops were planted and growing at time of commencement of foreclosure suit, do not require that mortgagee commence action for unlawful entry and detainer. *In re Hilburn*, 62 B.R. 597 (Bankr. N.D. Miss. 1986).

Crops matured and ready to be gathered are personal property belonging to the tenant who has the right, after evic-

tion or after expiration of his lease, to a reasonable time in which to gather the matured crops. *Garner v. Stuart Co.*, 222 Miss. 290, 75 So. 2d 747 (1954).

Pecan nuts matured at time injunction restraining tenant's gathering of crops was sued out by mortgagees under trust deed being foreclosed, held personal property belonging to tenant. *Wood v. Pace*, 164 Miss. 187, 143 So. 471 (1932).

Purchaser at mortgage sale of land planted by mortgageor's lessee is not enti-

tled to rent reserved, but only subsequent reasonable rental. *Joiner v. LeFlore Grocer Co.*, 145 Miss. 31, 110 So. 857 (1926).

The statute is remedial, and should be so construed as to give full effect to its purpose. *Parks v. Kline*, 118 Miss. 119, 79 So. 81 (1918).

Under foreclosure reasonable rental allowed purchaser. *Parks v. Kline*, 118 Miss. 119, 79 So. 81 (1918).

Under this proceeding, court at law may determine reasonable compensation for

use of land. *Parks v. Kline*, 118 Miss. 119, 79 So. 81 (1918).

The lawful tenancy of land vests title to crops grown thereon in the tenant subject to the statutory lien of the landlord. *Opperman v. Littlejohn*, 98 Miss. 636, 54 So. 77 (1911).

After termination of tenancy the tenant has reasonable time to remove crop. *Opperman v. Littlejohn*, 98 Miss. 636, 54 So. 77 (1911).

RESEARCH REFERENCES

ALR. Effectiveness of reservation of vendor's crop rights in land contract in absence of such reservation in deed later executed. 8 A.L.R.2d 565.

Law Reviews. Ownership of Crops on Foreclosed Land, Priority of After-Acquired Property Clauses in Farm Bankruptcies. 58 Miss. L. J. 481, Winter 1988.

§ 11-25-117. Judgment for defendant.

If the finding be in favor of the defendant, the court shall render judgment against the plaintiff that his complaint be dismissed, and that the defendant recover of him full costs.

SOURCES: Codes, 1942, § 1057; Laws, 1934, ch. 234; Laws, 1936, ch. 246.

Cross References — Parallel provision, see § 11-25-27.

RESEARCH REFERENCES

Am Jur. 35 Am. Jur. 2d, Forcible Entry and Detainer § 52. (Judgment for defendant).

12 Am. Jur. Pl & Pr Forms (Rev), Forcible Entry and Detainer, Forms 65-66 **CJS.** 36A C.J.S., Forcible Entry and Detainer § 91.

§ 11-25-119. Judgment not bar.

A judgment rendered in a suit of unlawful entry or detainer, either for the plaintiff or defendant, shall not bar any action in the circuit court between the same parties, respecting the same land; nor shall any judgment given therein be held conclusive of the facts found in any other action between the same parties.

SOURCES: Codes, 1942, § 1058; Laws, 1934, ch. 234; Laws, 1936, ch. 246.

Cross References — Parallel provision, see § 11-25-119.

JUDICIAL DECISIONS

1. In general.

The judgment in an action of unlawful entry and detainer brought by the purchaser of land at a sale under foreclosure of a deed of trust against one claiming title thereto under a parol gift and adverse possession that the former was not entitled to possession of the land was not res judicata to bar a subsequent action by such purchaser to confirm title in the land bought by her under such foreclosure sale. *Elmer v. Holmes*, 189 Miss. 785, 199 So. 84 (1940).

In unlawful entry and detainer action against execution debtor, creditor's title

under constable's deed cannot be conclusively adjudicated. *Vansant v. Dodds*, 164 Miss. 787, 144 So. 688 (1932), error overruled, 164 Miss. 799, 145 So. 613 (1933).

The judgment in unlawful detainer referred to in this section [Code 1942, § 1058] is no bar to an action of trespass, where the plaintiff in the action of trespass had been wrongfully evicted. As making clear the meaning of this section, see *Hutchinson's Code* ch 56 p 816; *Code 1857* ch 42 art 22; *Code 1871* § 1598. *Richardson v. Callihan*, 73 Miss. 4, 19 So. 95 (1895).

RESEARCH REFERENCES

Am Jur. 35 Am. Jur. 2d, Forcible Entry and Detainer § 49.

CJS. 36A C.J.S., Forcible Entry and Detainer § 88.

CHAPTER 27

Eminent Domain

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IN GENERAL

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§ 11-27-1. Who may exercise right of eminent domain.

Any person or corporation having the right to condemn private property for public use shall exercise that right as provided in this chapter, except as elsewhere specifically provided under the laws of the state of Mississippi.

SOURCES: Codes, 1942, § 2749-01; Laws, 1971, ch. 520, § 1, eff from and after January 1, 1972.

Cross References — Constitutional provision on taking of private property, see Miss. Const. Art. 3, § 17.

Acquisition of property by Gulf Regional District, see § 17-11-33.

Eminent domain powers of regional solid waste management authorities, see § 17-17-317.

Applicability of this chapter to county or regional railroad authorities, see § 19-29-19.

Municipality's power to acquire real property to create public utility system, see § 21-27-23.

Eminent domain in laying out of streets, see § 21-37-47.

Nonrecognition of gain realized on property which is compulsorily or involuntarily converted for public use under this chapter, see § 27-7-9.

Boards of education having power of eminent domain to acquire leased sixteenth section or lieu land for the construction of school buildings, see § 29-3-88.

Condemnation proceedings of state building commission, see § 31-11-25.

Applicability of this chapter to school districts, see 37-7-301.

Acquisition of real estate for community hospitals and health centers in counties, municipalities, etc., see § 41-13-15.

Eminent domain in housing, see § 43-33-19.

Real Property Acquisition Policies Law, see §§ 43-37-1 et seq.

Relocation Assistance Law, see §§ 43-39-1 et seq.

Powers and duties of game and fish commission, see § 49-1-29.

Acquiring lands overflowed by construction of dam, see § 49-1-33.

Exercise of the power of eminent domain by the Mississippi Commission on Wildlife, Fisheries and Parks for the purpose of improving oyster reefs or beds, see § 49-15-15(6).

Eminent domain powers of the Wavelands Regional Wastewater Management District, see § 49-17-171.

Eminent domain powers of the Mississippi Gulf Coast Regional Wastewater Authority, see § 49-17-311.

Compensation for removal of outdoor advertising, see § 49-23-17.

Powers of Pearl River Valley Water Supply District, see § 51-9-121.

Power of Tombigbee River Valley Water Management District, see § 51-13-111.

Powers of flood and drainage control district, see § 51-35-315.

Eminent domain in federal parks, see § 55-5-5.

Powers of bridge and park commissions, see §§ 55-7-7 et seq.

Eminent domain powers and duties as to industrial parks, see §§ 57-5-21, 57-5-23.

Mississippi Major Economic Impact Act, power relating to eminent domain, see § 57-75-11.

Acquisition of rights of way, land, etc., for state ports and harbors, see § 59-5-39.

Powers and authority of county which has port authority or development commission, see §§ 59-9-1 et seq.

Proceedings to establish landings, see §§ 59-19-5 et seq.

Acquisition of property for aviation purposes, see §§ 61-3-17, 61-5-7.

Application to provisions of Mississippi Wayport Authority Act, see § 61-4-11.

Eminent domain in control of highways, see § 65-1-47.

Boards of Supervisors exercising right of eminent domain, see § 65-33-23.

Power of eminent domain possessed by municipalities participating in joint project and joint agencies with respect to Joint Municipal Electric Power and Energy Law, see § 77-5-773.

Eminent domain proceedings, see Miss. R. Civ. P. 81.

UNDER 1942 CODE § 2749

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| 2. Right of eminent domain generally. | 9. —Change of grade of street or highway. |
| 3. Public utilities. | 10. Persons entitled to compensation or damages. |
| 4. Municipal corporations. | 11. Due compensation of damages. |
| 5. Sewerage systems. | |
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12. —Measure of compensation or damages.
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14. Limitation of actions.

1. In general.

To the extent that Chapter 27 makes provision for practice and procedure in eminent domain actions, it controls. However, Chapter 27 in and of itself is incomplete and stands supplemented by such rules of procedure, evidence and statute as otherwise apply to proceedings in the circuit or county court. *Mississippi State Hwy. Comm'n v. Herban*, 522 So. 2d 210 (Miss. 1988).

2. Right of eminent domain generally.

The evidence was sufficient to support a trial court's dismissal of a city's condemnation petition based on a finding of no public use where the city's contract with a gaming corporation for use of the land for the alleged purpose of urban renewal did not comply with § 43-35-19(b)'s competitive bidding requirement, and the city failed to provide conditions, restrictions, or covenants in its contract with the gaming corporation to ensure that the property would be used for the purpose of gaming enterprise or other related establishments. *Mayor of Vicksburg v. Thomas*, 645 So. 2d 940 (Miss. 1994).

A telephone company failed to meet the first prerequisite to the exercise of the statutory right of eminent domain where there was no evidence of valid, affirmative action on the part of the telephone company transforming the statutory authority of eminent domain into action. *AT & T v. Purcell Co.*, 606 So. 2d 93 (Miss. 1990).

A New York corporation which provided long distance telephone service across the country was required to comply with state law and, as a condition precedent to the exercise of the statutory right of eminent domain pursuant to § 77-9-717, to submit to the jurisdiction of the Mississippi Public Service Commission and obtain the following: (1) a determination that the telephone company qualified as an entity to which the legislature had granted the power of eminent domain pursuant to §§ 11-27-1 and 77-9-717; (2) a determination that the telephone company had complied with state law in invoking the stat-

utory power of eminent domain; and (3) a certificate of public convenience and necessity for the particular taking in question. *AT & T v. Purcell Co.*, 606 So. 2d 93 (Miss. 1990).

Where an eminent domain case was tried by all the parties on the theory of compensation for a small strip of land and an entire building, a portion of which was located on the strip of land, the condemnor was entitled to enter upon the land and remove the building from the property. *State Hwy. Comm'n v. Charmar, Inc.*, 569 So. 2d 1132 (Miss. 1990).

A superior governmental body may condemn the property of an inferior governmental body, and, consequently, the state highway commission has the power to condemn school property. *LaBarreare v. Lambert*, 284 So. 2d 50 (Miss. 1973).

The power of eminent domain is in derogation of the common law and should be construed favorably to the owner as against the condemnor, which rule applies to the quantum of interest to be taken as well as to the extent of the power vested in the condemnor. *Nicholson v. Board of Miss. Levee Comm'rs*, 203 Miss. 71, 33 So. 2d 604 (1948).

The legislature has the power to define the quantum of interest or estate which may be taken, whether an easement or the fee or some estate intermediate these two; the power is limited to the express terms or clear implication of the statute. *Nicholson v. Board of Miss. Levee Comm'rs*, 203 Miss. 71, 33 So. 2d 604 (1948).

If the statute does not define the quantum of the estate to be taken, whether an easement or the fee or some intermediate estate, no greater estate can be taken than the particular public use requires. *Nicholson v. Board of Miss. Levee Comm'rs*, 203 Miss. 71, 33 So. 2d 604 (1948).

That State Highway Department had, prior to instituting condemnation proceeding, already appropriated land for highway purposes held not to deprive it of its right to thereafter condemn land for highway purposes, even though original appropriation was wrongful. *State Hwy. Dep't v. Campbell*, 173 Miss. 397, 161 So. 461 (1935).

The right of eminent domain is limited to the express terms or necessary implications of the statute. *Wise v. Yazoo City*, 96 Miss. 507, 51 So. 453, Am. Ann. Cas. 1912B,377 (1910).

Eminent domain rights are attributable to sovereignty and the right must be exercised with great caution and only in cases of public necessity. *Wise v. Yazoo City*, 96 Miss. 507, 51 So. 453, Am. Ann. Cas. 1912B,377 (1910).

This chapter [Code 1942, §§ 2749 et seq.] is limited in its application to persons or corporations having a right to condemn and the powers herein conferred cannot be availed of by corporations without authority to condemn. *Cumberland Tel. & Tel. Co. v. Morgan*, 92 Miss. 478, 45 So. 429 (1908).

Const. 1890 § 17, making it a judicial question whether the contemplated use for which property is sought to be condemned is a public one, does not authorize the courts to determine the necessity for the taking. *Ham v. Board of Levee Comm'rs*, 83 Miss. 534, 35 So. 943 (1904); *Greenwood v. Gwin*, 153 Miss. 517, 121 So. 160 (1929).

That a trespasser, not pretending to exercise it, had the power of eminent domain, does not exempt him from liability to punitive damages. *Cumberland Tel. & Tel. Co. v. Cassedy*, 78 Miss. 666, 29 So. 762 (1901).

The general rule that "things affixed to the freehold by trespassers belong to the owner of the soil" is not applicable against a body having the right of eminent domain, and entering without leave and making improvements for the public purpose for which it was created and given such power. *Illinois Cent. R.R. v. Le Blanc*, 74 Miss. 650, 21 So. 760 (1897).

The proceeding under this chapter [Code 1942, § 2749] is to confer in a lawful way the right of a person or a corporation to take private property for public use after having made due compensation therefor. *Hopson v. Louisville, N.O. & T.R. Co.*, 71 Miss. 503, 15 So. 37 (1894).

Neither the right of the company to condemn for a right of way nor the measure of compensation to which the landowner is entitled therefor, is in any way affected by the fact that such owner, in an

action of trespass, had previously recovered of the company damages for having entered on the land and built and operated its railroad. *Hopson v. Louisville, N.O. & T.R. Co.*, 71 Miss. 503, 15 So. 37 (1894).

3. Public utilities.

Prior to exercising the power of eminent domain in Mississippi, a New York corporation which provided long distance telecommunications across the country was required to prove that it was (1) a telephone company (2) which was constructing new lines and (3) had taken the necessary steps to invoke the power of eminent domain. *AT & T v. Purcell Co.*, 606 So. 2d 93 (Miss. 1990).

A New York corporation which provided long distance telecommunications across the country would be entitled to invoke the power of eminent domain if it proved that it was a telephone company constructing new lines which had taken the necessary corporate steps to invoke the power of eminent domain and had obtained a certificate of public convenience and necessity from the Mississippi Public Service Commission. *AT & T v. Purcell Co.*, 606 So. 2d 93 (Miss. 1990).

The special court of eminent domain properly dismissed a condemnation petition brought by a New York corporation, which provided long distance telephone service across the country, for failure to first obtain a certificate of public convenience and necessity from the Mississippi Public Service Commission as a condition precedent to the exercise of eminent domain by a public utility. *AT & T v. Purcell Co.*, 606 So. 2d 93 (Miss. 1990).

The Mississippi Public Service Commission has the duty, authority, and therefore jurisdiction, over public utilities who come into the state of Mississippi and attempt to invoke the statutory right of eminent domain. *AT & T v. Purcell Co.*, 606 So. 2d 93 (Miss. 1990).

The state is authorized to grant to a telegraph company the right to condemn property of a railroad company. *Western Union Tel. Co. v. Louisville & N.R.R.*, 107 Miss. 626, 65 So. 650 (1914), *aff'd*, 250 U.S. 363, 39 S. Ct. 513, 63 L. Ed. 1032 (1919).

It requires statutory authority to empower telephone company to exercise the right of eminent domain. *Alabama & V. Ry. Co. v. Cumberland Tel. & Tel. Co.*, 88 Miss. 438, 41 So. 258 (1906).

The showing that a telegraph company offering to condemn land is a dummy cannot be used as a defense of action. *Alabama & V. Ry. Co. v. Cumberland Tel. & Tel. Co.*, 88 Miss. 438, 41 So. 258 (1906).

A railroad company is not debarred from condemning property because a former proceeding to condemn the same land had been dismissed by a justice of the peace and a petition for mandamus to compel him to proceed had been dismissed on demurrer in the circuit court. *Sullivan v. Yazoo & Miss. V. Ry.*, 85 Miss. 649, 38 So. 33 (1905).

4. Municipal corporations.

City may reopen street it has chosen to close; only requirement is that city reopen street through process of eminent domain as opposed to use of ordinance rescinding order closing street. *City of Jackson v. McAllister*, 475 So. 2d 432 (Miss. 1985).

A suit for damages in anticipation that the city would close an alley in violation of statute, and that the State Highway Commission would enter upon the alley and obstruct it by a dirt embankment was prematurely brought where no damages had yet resulted. *Collins v. Mississippi State Hwy. Comm'n*, 233 Miss. 474, 102 So. 2d 678 (1958).

A drainage district may have the right of eminent domain conferred upon them. *Riverside Drainage Dist. v. Buckner*, 108 Miss. 427, 66 So. 784 (1914).

With reference to power of city under Const. 1890 art. 3 § 17. *Illinois Cent. R.R. v. State*, 94 Miss. 759, 48 So. 561 (1909).

A municipality does not have the right to take or damage private property for public use, different from that of another person or corporation having the right of eminent domain. *City of Jackson v. Williams*, 92 Miss. 301, 46 So. 551 (1908).

5. Sewerage systems.

City could not be compelled to condemn complainant's whole right to construct sewerage system where public necessity only required equal easement with that of

complainant. *City of Greenwood v. Gwin*, 153 Miss. 517, 121 So. 160 (1929).

6. Waterworks.

City's application to condemn right to construct waterworks system sufficiently described right sought to be condemned. *City of Greenwood v. Gwin*, 153 Miss. 517, 121 So. 160 (1929).

7. Right to compensation.

A restrictive covenant is an interest in real property for which due compensation must be paid upon a taking by the exercise of eminent domain powers. *Morley v. Jackson Redevelopment Auth.*, 632 So. 2d 1284 (Miss. 1994).

An actual taking or physical invasion of property is not the only basis for compensation. Damage to adjacent private property caused by public use is also compensable. Property is damaged when it is made less valuable. Personal inconvenience, discomfort, or interference with use is not compensable unless it results in the depreciation of value. Even then, compensation is not definite, but these factors are evidence of conditions which adversely affect the value of land. Persons owning property abutting streets have a right to reasonable access to their property from the street, and altering that access may damage the property. Where alteration of access, including light, air and view, diminishes the value of the property, the owner is entitled to compensation; such compensation is commonly termed consequential damages. *Gilich v. Mississippi State Hwy. Comm'n*, 574 So. 2d 8 (Miss. 1990).

The alteration of access to property requires compensation only where, and to the extent that, alteration of access diminishes the value of the property. Matters such as parking and increased difficulty in maneuvering automobiles may likewise be considered to the extent of their adverse effect on property value. Additionally, loss of frontage that "moves" buildings and facilities closer to a roadway may adversely affect value and require compensation. However, compensation for such losses is due only to the extent that the damage is caused by governmental action as distinguished from landowner improvements. Thus, such losses are le-

gally illusory where there has been no taking, but only a reclaiming of a right-of-way that the landowner has theretofore enjoyed and where the landowner has boxed himself or herself in by the manner in which he or she has constructed or purchased the improvements on the property. So long as, after the governmental action at issue, there remains access which would be reasonable if the property had been reasonably improved, no compensation is due. *City of Gulfport v. Anderson*, 554 So. 2d 873 (Miss. 1989).

8. —Construction and use of streets and highways.

A business' use of a right-of-way, which was owned by the State Highway Commission, for customer parking for 50 years was permissive, such that the commission's subsequent use of the right-of-way did not amount to a "taking," since the business had knowledge of the commission's interest in the right-of-way, even though the business paved the right-of-way for purposes of parking. *Mississippi State Hwy. Comm'n v. Hale*, 531 So. 2d 623 (Miss. 1988).

In a proceeding to condemn land for the construction of a cloverleaf at the intersection of certain highways, which had not been limited access highways, an instruction that abutting landowner was not entitled to damages resulting solely from inconvenience in entering and leaving his remaining property, provided that the public at large suffered the same inconvenience, was erroneous. *Carney v. Mississippi State Hwy. Comm'n*, 233 Miss. 598, 103 So. 2d 413 (1958).

In a proceeding to condemn land for the construction of a cloverleaf at the intersection of certain highways, which had not been limited access highways, an instruction that the Highway Commission could construct the interchange on its right of way without payment of damages to an abutting property owner was erroneous, where it appeared that the construction included a high embankment near the owner's land, and the commission had revoked the owner's permit to enter the highway directly, so that his right of access to the highway was impaired. *Carney v. Mississippi State Hwy. Comm'n*, 233 Miss. 598, 103 So. 2d 413 (1958).

Since the city had no power to close the alley except upon first making due compensation to the abutting landowners, if the city had closed the alley without making due compensation and the State Highway Commission had entered upon and obstructed it by a dirt embankment, the city and Highway Commission would have been jointly liable. *Collins v. Mississippi State Hwy. Comm'n*, 233 Miss. 474, 102 So. 2d 678 (1958).

A street railway company, having authority to lay tracks in city streets, may run them across railroad company tracks in a street without condemnation proceedings. *Mississippi Cent. R.R. v. Hattiesburg Traction Co.*, 109 Miss. 101, 67 So. 897 (1915).

A railroad company under license from a municipality cannot construct its track along the public streets of a city without first making compensation for consequent damages to abutting owners, and this whether the fee of the street be in the owner or in the public. *Alabama & V. Ry. Co. v. Bloom*, 71 Miss. 247, 15 So. 72 (1894).

9. —Change of grade of street or highway.

Compensation is required for a change of grade in a roadway which adversely affects the value of adjacent property, such as where a change in grade casts increased quantities of water upon the landowner's property. *City of Gulfport v. Anderson*, 554 So. 2d 873 (Miss. 1989).

Statutes held to impliedly authorize payment by State Highway Commission for damage to private property incurred through public use, as by change in grade of highway, although no land is actually appropriated. *Parker v. State Hwy. Comm'n*, 173 Miss. 213, 162 So. 162 (1935).

City liable for damages for changing grade of street. *Funderburk v. City of Columbus*, 117 Miss. 173, 78 So. 1 (1918).

By obstructing street city is liable for damages. *Funderburk v. City of Columbus*, 117 Miss. 173, 78 So. 1 (1918).

10. Persons entitled to compensation or damages.

A landowner holding a reversionary interest in timber at the date the land was

"taken" is entitled to introduce evidence to establish the value of the timber. *Pearl River Valley Water Supply Dist. v. Wright*, 186 So. 2d 205 (Miss. 1966).

Where a highway, which had not been a limited access highway, was made into a nonaccess highway, this was the equivalent of an appropriation of the abutting property owner's right to have an easy way of access to the main highway. *Carney v. Mississippi State Hwy. Comm'n*, 233 Miss. 598, 103 So. 2d 413 (1958).

Deed to county by one partner, to right of way for highway, divests only that partner's interest. *Smith v. Board of Supvrs.*, 124 Miss. 36, 86 So. 707 (1921).

Equitable owner of property entitled to recover damages. *Funderburk v. City of Columbus*, 117 Miss. 173, 78 So. 1 (1918).

The owner of land damaged by the taking of the land of another is entitled to recover such damages under Const. 1890 § 17. *Mayor of Vicksburg v. Herman*, 72 Miss. 211, 16 So. 434 (1894); *Richardson v. Board of Miss. Levee Comm'rs*, 77 Miss. 518, 26 So. 963 (1899).

11. Due compensation of damages.

Homeowners who suffered additional damages allegedly attributable to a highway construction project a few years after the homeowners were compensated for the taking of their property by the condemning authority in an eminent domain action could not recover for the additional damages, even if those damages were not reasonably foreseeable at the time of the original eminent domain trial. *King v. Mississippi State Hwy. Comm'n*, 609 So. 2d 1251 (Miss. 1992).

Where a parcel of land was located in a commercial area and the only reason it had not been rezoned from residential to commercial use was the fact that it was known the property would be taken by condemnation for highway purposes, the highest and best use of the property was for commercial purposes and it should be valued as if it had been rezoned for such use. *Evans v. Mississippi State Hwy. Comm'n*, 197 So. 2d 805 (Miss. 1967).

The time of taking, for the purpose of determining due compensation, is the date of the institution of the eminent domain suit and not the date of its trial.

Pearl River Valley Water Supply Dist. v. Wright, 186 So. 2d 205 (Miss. 1966).

On a condemnation of land for levee purposes, the owner is not entitled to any damages because a part of his land is left outside of the levee, but is entitled to damages caused by the levee itself, such as the obstruction of drainage on the land so situate. *Duncan v. Board of Miss. Levee Comm'rs*, 74 Miss. 125, 20 So. 838 (1896).

Where a railroad company has entered upon and held and used land for seven or eight years, without procuring a right of way by condemnation or otherwise, it is not entitled, on the owner's proceeding for an appraisalment of his damages under the charter, to have them estimated as of the time of the original taking, but they shall be estimated as of the date of the proceeding as diminished by their market value as a plantation, and without deduction on account of any supposed benefit realized from its construction. *Louisville, N.O. & T. Ry. v. Hopson*, 73 Miss. 773, 19 So. 718 (1896).

Measure of compensation to which the landowner is entitled for condemnation of a right of way by a railroad company is not affected by the fact that such owner, in an action of trespass, had previously recovered damages against the company for having entered on the land and built and operated its railroad. *Hopson v. Louisville, N.O. & T.R. Co.*, 71 Miss. 503, 15 So. 37 (1894).

12. —Measure of compensation or damages.

Where public improvements are to be financed by a special assessment upon a class of property owners, a condemnee may not claim the present value of the assessment in diminution of the value of the remainder of his or her property after a portion has been taken. *Dear v. Madison County ex rel. Madison County Bd. of Supvrs.*, 649 So. 2d 1260 (Miss. 1995).

Under the unit valuation method of determining compensation in an eminent domain proceeding, the jury is to determine the value of the property to be condemned and then to apportion the damages to those with an interest in the property, such as fee owners, mortgagees, lienholders and lessees. *State Hwy.*

Comm'n v. Rankin County Bd. of Educ., 531 So. 2d 612 (Miss. 1988).

The just compensation in a partial land taking case is generally the value of the part taken plus all damages which the residue of the property suffers, including a diminution in the value of the remainder. *Anderson v. Guy*, 488 So. 2d 782 (Miss. 1986).

A partial taking which rendered the remainder unsuitable for continued use as a sawmill, the property's highest and best use, represented a loss bearing significantly on the owner's due compensation. *Anderson v. Guy*, 488 So. 2d 782 (Miss. 1986).

The court's refusal to permit a condemnee's attorney to show the value of an undeveloped tract, a portion of which was taken for highway purposes, as lots, and to fix its value upon "front footage", was not reversible error, since, while it was appropriate that the jury consider that the land had value as potential residential property, or other use for which the land might be adapted, it would be inappropriate for the jury to determine the present value of undeveloped land as if it were a residential or business subdivision. *Henry v. Mississippi State Hwy. Comm'n*, 231 So. 2d 778 (Miss. 1970).

In eminent domain proceedings the value of land sought to be condemned had to be determined on the basis that the property was zoned residential at the time of the taking, since such fact affected its fair market value at the time of the taking, and although there was a reasonable probability that it could be rezoned commercial in the near future, the property could not be valued as if the rezoning had already been accomplished. *Mississippi State Hwy. Comm'n v. Wagley*, 231 So. 2d 507 (Miss. 1970).

In eminent domain proceedings in order to apply the best use rule in determining the present value of land, mere speculative uses cannot be considered, but there must be some probability that the land would be used within a reasonable time for the particular use to which it is adapted or there must be a present demand for the land for such purpose or a reasonable expectation of such demand in the near future. *Mississippi State Hwy.*

Comm'n v. Wagley, 231 So. 2d 507 (Miss. 1970).

The rule is well settled that the present value of land sought to be condemned in eminent domain proceedings is not to be estimated simply with reference to the condition in which it is maintained or for the use to which it is at the time applied, but consideration must be given to the best or most valuable use to which the property is adapted. *Mississippi State Hwy. Comm'n v. Wagley*, 231 So. 2d 507 (Miss. 1970).

Save in exceptional cases where part of a tract is taken, due compensation is the value of property taken and the damage done to the fair market value of the entire tract by the taking. *Green Acres Mem. Park v. Mississippi State Hwy. Comm'n*, 246 Miss. 855, 153 So. 2d 286 (1963).

Where the whole property is taken, the damages are its fair market value. *Green Acres Mem. Park v. Mississippi State Hwy. Comm'n*, 246 Miss. 855, 153 So. 2d 286 (1963).

Market value is what one desirous of purchasing would give at the present time to one willing to sell. *Green Acres Mem. Park v. Mississippi State Hwy. Comm'n*, 246 Miss. 855, 153 So. 2d 286 (1963).

Anticipated profits from the sale of lots are not an element of damages recoverable in condemnation of an unused portion of a cemetery. *Green Acres Mem. Park v. Mississippi State Hwy. Comm'n*, 246 Miss. 855, 153 So. 2d 286 (1963).

Evidence of the sale price of similar cemetery property is inadmissible in a proceeding to condemn an unused portion of cemetery property. *Green Acres Mem. Park v. Mississippi State Hwy. Comm'n*, 246 Miss. 855, 153 So. 2d 286 (1963).

That a witness's estimate of damage is based on the value of the portion taken, without stating the value of the entire tract before and after the taking, does not render it inadmissible, where he states that he did not regard the taking as damaging the remaining portion. *Green Acres Mem. Park v. Mississippi State Hwy. Comm'n*, 246 Miss. 855, 153 So. 2d 286 (1963).

The recent sale of comparable property in the vicinity may be shown, to establish the fair cash value of the land acquired.

Green Acres Mem. Park v. Mississippi State Hwy. Comm'n, 246 Miss. 855, 153 So. 2d 286 (1963).

Evidence of the value of a cemetery as a going concern is not admissible in a proceeding to condemn an unused portion of its property. *Green Acres Mem. Park v. Mississippi State Hwy. Comm'n*, 246 Miss. 855, 153 So. 2d 286 (1963).

The anticipated profits from a cemetery business cannot be taken into consideration in determining the fair, cash market value of the land sought to be acquired. *Green Acres Mem. Park v. Mississippi State Hwy. Comm'n*, 246 Miss. 855, 153 So. 2d 286 (1963).

Where there was substantial evidence that landowner's property was worth approximately \$17,000 before the taking and \$2,000 after the taking, a judgment on a jury verdict in favor of the landowner for \$12,000 would be affirmed. *Mississippi State Hwy. Comm'n v. Gabbert*, 238 Miss. 687, 119 So. 2d 774 (1960).

Witnesses estimating the fair market value of property to be condemned should apply the before-and-after rule. *Mississippi State Hwy. Comm'n v. Daniels*, 235 Miss. 185, 108 So. 2d 854 (1959).

Inconvenience of crossing a highway dividing a parcel is not a proper separate item of damage for the taking of lands for the highway. *Mississippi State Hwy. Comm'n v. Daniels*, 235 Miss. 185, 108 So. 2d 854 (1959).

Before a witness as to value may be cross-examined as to prices paid for neighboring lands, similarity and likeness of quality must be shown. *Mississippi State Hwy. Comm'n v. Daniels*, 235 Miss. 185, 108 So. 2d 854 (1959).

The price of land similar to and of like quality to that involved in the case may be shown to weaken opinion evidence as to value. *Mississippi State Hwy. Comm'n v. Daniels*, 235 Miss. 185, 108 So. 2d 854 (1959).

Under Code 1942, § 2775, municipality which dismissed an eminent domain proceeding became liable for counsel and expert witness fees incurred by the landowner in preparation of a defense to the proceeding. *City of Jackson v. Lee*, 234 Miss. 502, 106 So. 2d 892 (1958).

Where private property is taken for public use, and there is a market price

prevailing at the time and place of taking, that price is just compensation. *Anderson-Tully Co. v. United States*, 189 F.2d 192 (5th Cir. 1951), cert. denied, 342 U.S. 826, 72 S. Ct. 47, 96 L. Ed. 624 (1951).

Where only a part of a tract is taken in the exercise of eminent domain, the owner is entitled to recover damages not only for the part taken but also for injuries accruing to the residue from the taking. *Mississippi State Hwy. Comm'n v. Dodson*, 207 Miss. 229, 42 So. 2d 179 (1949).

When a portion of a parcel of land is to be taken for public use, owner is entitled to recover for injury to the remainder of that parcel only, and cannot recover for injury to separate and independent parcels of land which he may happen to own in the same neighborhood and in determining what constitutes a separate and independent parcel of land, when the property is actually used and occupied, "unity of use" is the principal test. *Mississippi State Hwy. Comm'n v. Dodson*, 207 Miss. 229, 42 So. 2d 179 (1949).

If a tract of land, no part of which is taken, is used in connection with the same farm or enterprise, part of which was taken by eminent domain for public highway, it is not considered a separate and independent parcel merely because it was bought at different time, and separated by imaginary line, or even if the two tracts are separated by highway, railroad, or canal. *Mississippi State Hwy. Comm'n v. Dodson*, 207 Miss. 229, 42 So. 2d 179 (1949).

Two separate tracts of land, one quarter mile apart, joined by a strip of land subsequently purchased to facilitate farming, cattle-raising, and dairying operations are not separate and independent parcels and can be considered as a unit in determining damage resulting from condemnation of a strip of land on one of the tracks for a public highway. *Mississippi State Hwy. Comm'n v. Dodson*, 207 Miss. 229, 42 So. 2d 179 (1949).

The value of the land taken plus the damage, if any, to the remainder of the tract, testing that by the comparative value before and after such taking, is the correct rule for ascertaining the entire damage. *Mississippi State Hwy. Comm'n v. Burwell*, 206 Miss. 490, 39 So. 2d 497

(1949), corrected, 206 Miss. 490, 40 So. 2d 263 (1949).

Measure of damage to property not actually taken is difference between fair market value of such property before, as compared to such value after, the taking. *Baker v. Mississippi State Hwy. Comm'n*, 204 Miss. 166, 37 So. 2d 169 (1948).

While the jury must base its verdict on difference between before and after value of property, replacement, reconstruction and remedying costs may be shown and used as bearing upon accuracy, or inaccuracy, of amount of damage deduced from proof of comparative values. *Baker v. Mississippi State Hwy. Comm'n*, 204 Miss. 166, 37 So. 2d 169 (1948).

Court may, in a proper case, allow interest as part of the damages or compensation to which the owner is entitled when property is taken under power of eminent domain. *Mississippi State Hwy. Comm'n v. Treas*, 197 Miss. 670, 20 So. 2d 475 (1945).

The formula for measuring compensation to be awarded the owner in an eminent domain proceeding, when a part of his land is taken for public use is: When part of a larger tract of land is taken for public use, the owner should be awarded the difference between the fair market value of the whole tract immediately before the taking, and the fair market value of that remaining immediately after the taking, without considering the general benefits or injuries resulting from the use to which the land taken is to be put, that are shared by the general public. *Mississippi State Hwy. Comm'n v. Hillman*, 189 Miss. 850, 198 So. 565 (1940).

The formula or the rule of before and after taking must be construed in connection with the facts of the case the court is then considering and the particular questions there presented for decision. *Mississippi State Hwy. Comm'n v. Hillman*, 189 Miss. 850, 198 So. 565 (1940).

An instruction on the measure of damages in an eminent domain proceeding that it is the difference between the fair market value of the property before taking and the fair market value of what remained after the land was taken and a public road constructed, cannot be complained of by the parties to the proceeding because it failed to include the qualifica-

tion that general benefits and injuries shared by the general public should not be considered, and that the market value of the land must be that immediately before and after the taking, since the landowner requested such instruction and the highway commission, seeking condemnation, was not harmed thereby where there was no evidence by the commission as to general benefits and no evidence by the landowner as to general injuries. *Mississippi State Hwy. Comm'n v. Hillman*, 189 Miss. 850, 198 So. 565 (1940).

The compensation awarded the landowner in an eminent domain proceeding is conclusively presumed to include all damages resulting to him from the proper use of the land taken, as in the case of a highway, the proper construction of the contemplated highway. *Mississippi State Hwy. Comm'n v. Hillman*, 189 Miss. 850, 198 So. 565 (1940).

Where the rule that the measure of damages in an eminent domain proceeding is the difference between the fair market value of the property before the taking and the fair market value after the taking, is applicable, the owner of the land cannot recover damages for specific injuries to the remaining land, although evidence of such injuries is competent, if, but not unless, they would affect the market value of the remaining land. *Mississippi State Hwy. Comm'n v. Hillman*, 189 Miss. 850, 198 So. 565 (1940).

The market value of property is the price which it will bring when it is offered for sale by one who desires, but is not obliged, to sell it, and is bought by one who is under no necessity of having it. *Mississippi State Hwy. Comm'n v. Hillman*, 189 Miss. 850, 198 So. 565 (1940).

A witness testifying as to the market value of the land before the taking for the construction of a highway and the market value after the taking, should not have been permitted, in arriving at the latter value, to take into consideration specific items of injury to the remaining land and the expense incurred thereby as separate elements of damages. *Mississippi State Hwy. Comm'n v. Hillman*, 189 Miss. 850, 198 So. 565 (1940).

The value of trees on the land taken in a condemnation proceeding to condemn

land for a state highway, could not be considered as a separate item of damage but was for consideration by the jury only in arriving at the value of the land on which they were, and it was erroneous to permit the introduction of such evidence as a separate item of damages. *Mississippi State Hwy. Comm'n v. Hillman*, 189 Miss. 850, 198 So. 565 (1940).

The inconvenience to the landowners, occasioned by the taking of land for the construction of a highway, to the effect that the construction of a highway increased the distance to be traveled to and from the owners' dwelling-house and a public road, and whether it could have been removed at a reasonable expense, was a fact to be considered by the jury in fixing the market value of the land remaining after the taking of a part thereof, but it was erroneous to permit its introduction as a separate item of damage. *Mississippi State Hwy. Comm'n v. Hillman*, 189 Miss. 850, 198 So. 565 (1940).

Evidence on the issue of damages in an eminent domain proceeding to take land for the construction of a state highway, that it would be necessary for the landowners to incur certain specific items of expense in the use and enjoyment of their remaining land, in such form as to suggest to the jury that each might be considered as a separate item of damage, and not simply as a fact bearing on the market value of the remaining land, such as the expense of building a fence on each side of the highway, rebuilding a chicken yard fence, re-establishing a fish-pond that was partly on the land taken, should not have been admitted. *Mississippi State Hwy. Comm'n v. Hillman*, 189 Miss. 850, 198 So. 565 (1940).

Measure of value held difference between market value of entire tract before and after taking. *State Hwy. Comm'n v. Day*, 181 Miss. 708, 180 So. 794 (1938).

Measure of damages in condemnation proceedings is difference between fair market value of land before taking and fair market value of what remains after land is taken. *State Hwy. Comm'n v. Brown*, 176 Miss. 23, 168 So. 277 (1936).

In estimating damages in condemnation proceeding, consideration must be

given fair market value of property and all of its available uses and purposes and consequential damages which flow from the taking. *State Hwy. Comm'n v. Brown*, 176 Miss. 23, 168 So. 277 (1936).

In eminent domain proceeding, adaptability of land for particular purpose is immaterial unless present market value is enhanced thereby. *State Hwy. Comm'n v. Brown*, 176 Miss. 23, 168 So. 277 (1936).

In eminent domain proceeding, evidence concerning adaptability of land on railroad track for manufacturing enterprises which did not disclose probability that land would be put to such use within reasonable time held insufficient to furnish jury with standard upon which present fair market value of land could be determined. *State Hwy. Comm'n v. Brown*, 176 Miss. 23, 168 So. 277 (1936).

In eminent domain proceeding, where court gave numerous instructions fixing measure of damages as difference between fair market value of land and buildings before taking and value of what remained after taking, inconsistent instruction fixing replacement value as measure of damages held reversible error, where jury awarded approximately highest estimate, according to replacement value. *Mississippi State Hwy. Dep't v. Blackburn*, 172 Miss. 554, 160 So. 73 (1935).

Measure of landlord's damage in condemnation proceedings. *Schlict v. Clark*, 114 Miss. 354, 75 So. 130 (1917).

Evidence of enhanced value due to construction of railroad is not admissible in determining damages to property taken. *Romano v. Yazoo & Miss. V. Ry.*, 87 Miss. 721, 40 So. 150 (1906).

The measure of a railroad company's damages on condemnation of its right of way for a telegraph line is not the value of the land embraced within the right of way between the poles, and under the wires, but the extent to which the value of the use of such spaces by the railroad company is diminished by the telegraph company's use. *Mobile & O.R. Co. v. Postal Tel. Cable Co.*, 76 Miss. 731, 26 So. 370 (1899).

13. Review.

State Highway Department held not to have waived its right to appeal from judgment awarding damages in condemnation

proceeding by fact that department had entered upon and appropriated the land, where appropriation had occurred prior to institution of condemnation proceeding. *State Hwy. Dep't v. Campbell*, 173 Miss. 397, 161 So. 461 (1935).

14. Limitation of actions.

The six-year statute of limitations bars action for damages by construction of switch. *Romano v. Yazoo & Miss. V. Ry.*, 87 Miss. 721, 40 So. 150 (1906).

ATTORNEY GENERAL OPINIONS

Section 65-7-89 clearly authorizes the Board to institute eminent domain proceedings to gain parcels of land to construct a segment of state highway on the land. However, it may not use the quick take procedure of Section 11-27-1 et seq.

Welch, August 9, 1996, A.G. Op. #96-0402.

The eminent domain powers of joint water management districts referred to in Section 51-8-33 are those set forth in Sections 11-27-1 through 11-27-51. Applewhite, Oct. 27, 2000, A.G. Op. #2000-0635.

RESEARCH REFERENCES

ALR. Constitutional rights of owner as against destruction of building by public authorities. 14 A.L.R.2d 73.

Liability of condemnor in eminent domain proceedings for fees of expert witnesses who testified for property owner. 18 A.L.R.2d 1225.

Abutting owner's right to damages or other relief for loss of access because of limited-access highway or street. 43 A.L.R.2d 1072.

Rights in respect of real-estate taxes where property is taken in eminent domain. 45 A.L.R.2d 522.

Fire hazard as element of damages on condemnation. 63 A.L.R.2d 313.

Eminent domain: restrictive covenant or right to enforcement thereof as compensable property right. 4 A.L.R.3d 1137.

Plotting or planning in anticipation of improvement as taking or damaging of property affected. 37 A.L.R.3d 127.

Propriety of court's consideration of ecological effects of proposed project in determining right of condemnation. 47 A.L.R.3d 1267.

Salting for snow removal as taking or damaging abutting property for eminent domain purposes. 64 A.L.R.3d 1239.

Eminent domain: right to condemn property owned or used by private educational, charitable, or religious organization. 80 A.L.R.3d 833.

Eminent domain: validity of appropriation of property for anticipated future use. 80 A.L.R.3d 1085.

Good will as element of damages for condemnation of property on which private business is conducted. 81 A.L.R.3d 198.

Eminent domain: possibility of overcoming specific obstacles to contemplated use as element in determining existence of necessary public use. 22 A.L.R.4th 840.

Airport operations or flight of aircraft as constituting taking or damaging of property. 22 A.L.R.4th 863.

Fear of powerline, gas or oil pipeline, or related structure as element of damages in easement condemnation proceeding. 23 A.L.R.4th 631.

Damages resulting from temporary conditions incident to public improvements or repairs as compensable taking. 23 A.L.R.4th 674.

Eminent domain: industrial park or similar development as public use justifying condemnation of private property. 62 A.L.R.4th 1183.

Right of out-of-state property owner to commence in, or remove to, federal court action involving taking of property by state, local, government, or agency thereof. 4 A.L.R. Fed. 236.

Am Jur. 26 Am. Jur. 2d, Eminent Domain §§ 13 et seq.

9 Am. Jur. Pl & Pr Forms (Rev), Eminent Domain, Form 31.1 (Complaint, petition, or declaration — For condemnation — By state agency — For state transportation facility).

9 Am. Jur. Pl & Pr Forms (Rev), Eminent Domain, Form 303.1 (Answer-State-

ment of defendant's interest in property-Allegations of damage to business and remaining property).

7 Am. Jur. Legal Forms 2d, Eminent Domain §§ 97:15-97:17 (Acts preliminary to exercise of power of eminent domain).

7A Am. Jur. Legal Forms 2d, Eminent Domain §§ 97:31 et seq. (compensation).

11 Am. Jur. Trials, Condemnation of Urban Property, §§ 1 et seq.

10 Am. Jur. Proof of Facts 2d, Eminent Domain: Lack of Necessity for Taking Property, §§ 9 et seq. (proof of lack of reasonable necessity for taking property

for urban renewal project).

28 Am. Jur. Proof of Facts 2d 615, Eminent Domain: Traffic Noise and Vibration.

19 Am. Jur. Proof of Facts 3d 613, Highest and Best Use of Property Taken Under Eminent Domain.

CJS. 29A C.J.S., Eminent Domain §§ 20 et seq.

Law Reviews. Symposium on Mississippi Rules of Civil Procedure: Pretrial Procedure, Applicability of Rules, and Jurisdiction and Venue — Rules 16, 81 and 82. 52 Miss. L. J. 105, March 1982.

§ 11-27-3. Court of eminent domain.

A special court of eminent domain is hereby created, to consist of a judge, jury, and such other officers and personnel as hereinafter set out, and it shall have and exercise the jurisdiction and powers hereinafter enumerated. The original powers and jurisdiction shall be and is hereby fixed in the county court in each county that has elected to come under the provisions of Section 9-9-1 Mississippi Code of 1972, or that may hereafter come under the provisions of said Section 9-9-1, and in every other county of this state, the original powers and jurisdiction shall be and is hereby fixed in the circuit court of such county, which said powers and jurisdiction may be exercised in full either in termtime or vacation, or both.

SOURCES: Codes, 1942, § 2749-02; Laws, 1971, ch. 520, § 2, eff from and after January 1, 1972.

Cross References — Jurisdiction of county courts generally, see § 9-9-21.

Term of court of eminent domain, see § 11-27-29.

Eminent domain proceedings, see Miss. R. Civ. P. 81.

JUDICIAL DECISIONS

1. In general.

Since the original powers and jurisdiction of the special court of eminent domain are fixed in the county or circuit courts, as provided in § 11-27-3, the discovery provisions of §§ 13-1-201 through 13-1-271 apply to proceedings in the special court as well as to other civil proceedings in the county and circuit courts. Thus, in a proceeding by owners of property condemned as a result of the relocation of a state highway, the special court of eminent domain erred in refusing to extend the discovery statutes to the condemnation proceeding. *Barrett v. State Hwy. Comm'n*, 385 So. 2d 627 (Miss. 1980).

When a special court of eminent domain concludes the matter or matters for which it was convened and a final judgment is entered, it automatically goes out of existence and no longer has jurisdiction to hear and determine any matters filed thereafter, unless an order has been entered on its minutes granting additional time with which to file such matters. This rule is the same whether the court is convened in vacation or during a regular term of the circuit or county court. *Mississippi State Hwy. Comm'n v. First Methodist Church, Inc.*, 323 So. 2d 92 (Miss. 1975).

By way of pendant jurisdiction, the em-

inent domain court is allowed to decide questions of title where the issue arises from the "common nucleus of operative fact." In other words, where the eminent domain court has subject matter jurisdiction of a condemnation proceeding as established in the pleadings, the court may determine any questions of title which

may arise from the proceedings. To the extent that *Evans v. Mississippi Power Company* (Miss. 1968) 206 So. 2d 321 and *Whitehead v. Mississippi State Highway Commission* (Miss. 1971) 254 So. 2d 347 hold otherwise, they are overruled. *McDonald's Corp. v. Robinson Indus., Inc.*, 592 So. 2d 927 (Miss. 1991).

RESEARCH REFERENCES

ALR. Construction and application of rule requiring public use for which property is condemned to be "more necessary" or "higher use" than public use to which property is already appropriated—state takings. 49 A.L.R.5th 769.

Jury trial under Rule 71A(h) of Federal Rules of Civil Procedure (Fed. Rules Civ. Proc., Rule 71A(h), 28 U.S.C.S.) in condemnation proceedings by United States. 164 A.L.R. Fed. 341.

Am Jur. 27 Am. Jur. 2d, Eminent Domain §§ 474 et seq.

CJS. 29A C.J.S., Eminent Domain §§ 201 et seq.

Law Reviews. Symposium on Mississippi Rules of Civil Procedure: Pretrial Procedure, Applicability of Rules, and Jurisdiction and Venue — Rules 16, 81 and 82. 52 Miss. L. J. 105, March 1982.

Evidence of Business Factors in Condemnation Proceedings Concerning Certificates of Public Convenience and Necessity. 52 Miss. L. J. 927, December 1982.

§ 11-27-5. Complaint to condemn; parties; preference.

Any person or corporation having the right to condemn private property for public use shall file a complaint to condemn with the circuit clerk of the county in which the affected property, or some part thereof, is situated and shall make all the owners of the affected property involved, and any mortgagee, trustee or other person having any interest therein or lien thereon a defendant thereto. The complaint shall be considered a matter of public interest and shall be a preference case over other cases except other preference causes. The complaint shall describe in detail the property sought to be condemned, shall state with certainty the right to condemn, and shall identify the interest or claim of each defendant.

SOURCES: Codes, 1942, § 2749-03; Laws, 1971, ch. 520, § 3; Laws, 1991, ch. 573, § 61, eff from and after July 1, 1991.

Cross References — Eminent domain proceedings, see Miss. R. Civ. P. 81.

JUDICIAL DECISIONS

1. In general.
2. Parties.
3. Description of property.

1. In general.

Prior to exercising the power of eminent domain in Mississippi, a New York corporation which provided long distance tele-

communications across the country was required to prove that it was (1) a telephone company (2) which was constructing new lines and (3) had taken the necessary steps to invoke the power of eminent domain. *AT & T v. Purcell Co.*, 606 So. 2d 93 (Miss. 1990).

A telephone company failed to meet the

first prerequisite to the exercise of the statutory right of eminent domain where there was no evidence of valid, affirmative action on the part of the telephone company transforming the statutory authority of eminent domain into action. *AT & T v. Purcell Co.*, 606 So. 2d 93 (Miss. 1990).

The special court of eminent domain properly dismissed a condemnation petition brought by a New York corporation, which provided long distance telephone service across the country, for failure to first obtain a certificate of public convenience and necessity from the Mississippi Public Service Commission as a condition precedent to the exercise of eminent domain by a public utility. *AT & T v. Purcell Co.*, 606 So. 2d 93 (Miss. 1990).

In an eminent domain action, the proper procedure to determine compensation under the unit valuation method is to file the petition against all persons and parties claiming an interest in the property sought to be condemned and for the jury to determine the value of the property being condemned and then to apportion the damages to the proper parties, in this case a fee holder and a leaseholder. The State Highway Commission's partial appeal from that portion of the verdict awarded to the leaseholder would be dismissed, where the Commission was not appealing the total verdict, and had already paid the portion awarded to the fee holder, who was no longer a party to the litigation. *Lennep v. Mississippi State Hwy. Comm'n*, 347 So. 2d 341 (Miss. 1977).

Where, following the establishment by an inverse condemnation suit of an aviation easement against landowners' property but before assessment of damages therefor, the airport condemned said property in an eminent domain proceeding, the compensation paid the landowners in the eminent domain proceeding did not preclude them from recovering damages for the previously taken easement. *Wright v. Jackson Mun. Airport Auth.*, 300 So. 2d 805 (Miss. 1974), rev'd, 344 So. 2d 471 (Miss. 1977).

Under the requirement of this section [Code 1942, § 2751] that an application to condemn land must describe the land sought to be condemned with certainty,

the petition in a condemnation proceeding which described property "exclusive of the right of way of present Mississippi Highway No. 63" was insufficient to describe that part of the condemnee's property subject to condemnation, in view of a dispute between the condemnee and the highway commission as to the extent of the right-of-way. *Whitehead v. Mississippi State Hwy. Comm'n*, 254 So. 2d 357 (Miss. 1971), but see *McDonald's Corp. v. Robinson Indus., Inc.* 592 So. 2d 927 (Miss. 1991).

Where a company seeks to condemn a power line right of way, together with any and all "danger trees" then or thereafter growing beyond the limits of the right of way, the condemnee is entitled to a bill of particulars requiring the condemnor to designate the number, kind, and location of the trees which are presently to be cut as "danger trees." *Mississippi Power Co. v. Leggett*, 197 So. 2d 475 (Miss. 1967).

By requiring a company desiring to condemn a power line right of way and "danger trees" growing beyond the limits of the right of way to designate the number, kind, and location of the "danger trees" which are presently to be cut and severed, the jury can determine to what extent the rights of the condemnee will be invaded by the condemnor, which trees will be similarly cut within the next 5 or 10 years, and the extent to which the condemnor's right of ingress and egress for the purpose of cutting will damage the condemnee. *Mississippi Power Co. v. Leggett*, 197 So. 2d 475 (Miss. 1967).

A petition to condemn an electric power line right of way and "danger trees," described in the petition is any and all trees then or thereafter growing beyond the limits of the right of way, any part of which would, in falling directly toward the line, strike any structure or conductor of the line, or come within 5 feet of any conductor or structure, described with sufficient accuracy the property sought to be condemned within the meaning of this section [Code 1942, § 2751]. *Mississippi Power Co. v. Leggett*, 197 So. 2d 475 (Miss. 1967).

The application need not name and particularize the use or uses of the land to be condemned. *Horne v. Pearl River Valley*

Water Supply Dist., 249 Miss. 358, 162 So. 2d 504 (1964).

The taking of land for a public purpose which is primary and paramount will not be defeated by the fact that a private use or benefit which would not of itself warrant condemnation will result. *Horne v. Pearl River Valley Water Supply Dist.*, 249 Miss. 358, 162 So. 2d 504 (1964).

The taking of land adjacent to a water storage reservoir is not precluded by the location thereon of a service center for recreation seekers. *Horne v. Pearl River Valley Water Supply Dist.*, 249 Miss. 358, 162 So. 2d 504 (1964).

Holding power company cutting trees in making survey with a view to condemnation, not liable to statutory penalty. *Wood v. Mississippi Power Co.*, 245 Miss. 103, 146 So. 2d 546 (1962).

The statement of rights sought to be condemned may, on an appeal to the circuit court, be amended so as to exclude rights not desired. *Mississippi State Hwy. Comm'n v. Daniels*, 235 Miss. 185, 108 So. 2d 854 (1959).

Every essential prerequisite to the jurisdiction prescribed by statute must be complied with and such prerequisite must affirmatively appear on the face of the proceeding. However, a substantial compliance is sufficient. *Western Union Tel. Co. v. Louisville & N.R.R.*, 107 Miss. 626, 65 So. 650 (1914), *aff'd*, 250 U.S. 363, 39 S. Ct. 513, 63 L. Ed. 1032 (1919).

2. Parties.

Under subsection (2)(d), a person who claims an easement by prescription across condemned land should be made a party to a condemnation proceeding. *Bishop v. Mississippi Transp. Comm'n*, 734 So. 2d 218 (Miss. Ct. App. 1999).

The purchaser of land at a tax sale, even prior to the expiration of the period of redemption, is a necessary party to an eminent domain action, where the provi-

sions of Code 1942, §§ 9935 and 9936 had been complied with. *Mississippi State Hwy. Comm'n v. Casey*, 253 Miss. 685, 178 So. 2d 859 (1965).

The objection of nonjoinder of necessary parties required hereunder is not available to a party not affected thereby. *Dantzler v. Mississippi State Hwy. Comm'n*, 190 Miss. 137, 199 So. 367 (1941).

Condemner must determine at his peril the names of the owner and other persons having an interest in or lien on the premises sought to be condemned. *Mississippi State Hwy. Comm'n v. West*, 181 Miss. 206, 179 So. 279 (1938).

Person named as defendant who has no interest in property, held not entitled to compensation. *Mississippi State Hwy. Comm'n v. West*, 181 Miss. 206, 179 So. 279 (1938).

Where sublease had expired prior to institution of condemnation proceedings, sublessees, made parties to the proceedings, were entitled at most to only nominal damages. *Mississippi State Hwy. Comm'n v. West*, 181 Miss. 206, 179 So. 279 (1938).

Doctrine of estoppel by judicial admissions held not to apply to condemnation proceedings. *Mississippi State Hwy. Comm'n v. West*, 181 Miss. 206, 179 So. 279 (1938).

A person not having the right to condemn property will not be aided by uniting in the petition, over the protest of the owner of the property, a corporation having the right to condemn. *Cumberland Tel. & Tel. Co. v. Morgan*, 92 Miss. 478, 45 So. 429 (1908).

3. Description of property.

The statute does not require that an eminent domain property description be expressed in terms of metes and bounds. *Ford v. Destin Pipeline Co.*, 809 So. 2d 573 (Miss. 2000).

RESEARCH REFERENCES

ALR. Intervention in condemnation proceedings by adjoining landowners claiming consequential damage. 61 A.L.R.2d 1292.

Am Jur. 27 Am. Jur. 2d, Eminent Domain §§ 519 et seq.

9 Am. Jur. Pl and Pr Forms (Rev), Eminent Domain, Forms 1 et seq. (Com-

ment of condemnation proceedings).

13 Am. Jur. Legal Forms 2d, Mortgages and Trust Deeds §§ 179:245, 179:245.1 (condemnation award).

CJS. 29A C.J.S., Eminent Domain §§ 247 et seq.

§ 11-27-7. Filing complaint; lis pendens; time and place of hearing; notice; pleadings.

The complaint shall be filed with the circuit clerk and shall be assigned a number and placed on the docket as other pleadings in circuit court or county court. The plaintiff shall also file a lis pendens notice in the office of the chancery clerk immediately after filing the complaint. The circuit clerk, or the plaintiff by his attorney, shall forthwith present such complaint to the circuit judge or county judge, as the case may be, who shall by written order directed to the circuit clerk fix the time and place for the hearing of the matter, in termtime or vacation, and the time of hearing shall be fixed on a date to allow sufficient time for each defendant named to be served with process as is otherwise provided by the Mississippi Rules of Civil Procedure, for not less than thirty (30) days prior to the hearing. If a defendant, or other party in interest, shall not be served for the specified time prior to the date fixed, the hearing shall be continued to a day certain to allow the thirty-day period specified. Not less than twenty (20) days prior to the date fixed for such hearing, the plaintiff shall file with the circuit clerk and serve upon the defendants, or their respective attorneys, a statement showing: (1) the fair market value of the property to be condemned, determined as of the date of the filing of the complaint; (2) the damages, if any, to the remainder if less than the whole is taken, giving a total compensation and damages to be due as determined by the plaintiff. Not less than ten (10) days prior to the date fixed for such hearing, each of the defendants shall file with the circuit clerk and serve upon the plaintiff, or his attorney, a statement showing: (1) the fair market value of the property to be condemned, determined as of the date of the filing of the complaint; (2) the damages, if any, to the remainder if less than the whole is taken, giving a total compensation and damages to be due as determined by the defendants. In each such instance, both the plaintiff and the defendant shall set out in such statement the asserted highest and best use of the property and shall itemize the elements of damage, if any, to the remainder if less than the whole is taken. The statements required by this section shall constitute the pleadings of the parties with respect to the issue of value, and shall be treated as pleadings are treated in civil actions in the circuit court. The judge, for good cause shown, may increase or decrease the time for pleading by the plaintiff or by the defendant.

SOURCES: Codes, 1942, § 2749-04; Laws, 1971, ch. 520, § 4; Laws, 1991, ch. 573, § 62, eff from and after July 1, 1991.

Cross References — Eminent domain proceedings, see Miss. R. Civ. P. 81.

JUDICIAL DECISIONS

1. In general.

Although § 11-27-7 states that the landowners will not be required to submit their statement of values until 10 days before trial, that does not mean that experts' opinions and the bases therefor are not discoverable. *Morley v. Jackson Redevelopment Auth.*, 632 So. 2d 1284 (Miss. 1994).

A trial court should not have entered a default judgment in an eminent domain proceeding merely because the State Highway Commission failed to file a statement of values as required by § 11-27-7 where the only issue was the amount of damages that the landowner would receive from the Commission, both parties came to trial ready to proceed, the landowner would not have been prejudiced by an extension of time for the Commission to file the statement, and the landowner knew to what extent the Commission valued the land because the parties had been involved in unsuccessful negotiations concerning the value of the land. *State Hwy. Comm'n v. Hyman*, 592 So. 2d 952 (Miss. 1991).

Statements of value in an eminent domain proceeding are to be treated as pleadings are treated in civil causes in the circuit court and thus may be amended. *Hudspeth v. State Hwy. Comm'n*, 534 So. 2d 210 (Miss. 1988).

Before either party in an eminent domain proceeding may complain of a variance from the statement of values, timely objection must be tendered when the opposition seeks to exceed the statement of values. Failure of objection results in waiver of the point. *Mississippi State Hwy. Comm'n v. Viverette*, 529 So. 2d 896 (Miss. 1988).

Admission of testimony of landowner regarding loss of profits was reversible error due to uncertainty and speculation involved in future of any business; testimony of landowner regarding future profits was even more speculative because landowner did not even have business located on property condemned on date of filing of application for special court of eminent domain. *State Hwy. Comm'n v. Smith*, 511 So. 2d 881 (Miss. 1987).

Mississippi recognizes before and after rule in determining measure of damages when part of tract of land is taken for public use, and while testimony as to comparable land sales is admissible in establishing fair market value of condemned property, it is error to allow jury to consider evidence of sales of non-comparable property; appraisers for landowner failed to establish probability that subject land would either be used within reasonable time for commercial purposes, or that there was demand for such property for those purposes. *State Hwy. Comm'n v. Smith*, 511 So. 2d 881 (Miss. 1987).

Highway Department had not waived its right to claim less damage than amount in statement of values filed in eminent domain court by failing to assert lesser amount at trial and before Supreme Court, where statute makes statement of values filed by Highway Department a pleading. *State Hwy. Comm'n v. McDonald's Corp.*, 509 So. 2d 856 (Miss. 1987).

In an eminent domain proceeding to condemn a 1.52-acre strip of land out of a six-acre tract, a fatal variance existed between the highway commission's statement of value, which constituted its pleadings on the issue of value, and its proof, where, at trial, the commission's only appraiser testified that the landowner's total damages were 40% less than that contained in its filed statement of value. *Tyson, Inc. v. Mississippi State Hwy. Comm'n*, 367 So. 2d 939 (Miss. 1979).

The judge in a special court of eminent domain did not abuse his discretion by entering an order nunc pro tunc allowing the landowner to file his amended statement of values on the day of trial where the record did not show that the commission was prejudiced thereby. *Mississippi State Hwy. Comm'n v. Amos*, 319 So. 2d 231 (Miss. 1975).

The requirement that all parties of interest be made parties and be duly notified by proper process is not directory, but must be strictly followed; thus, a mortgagee was an interested party and had to be summoned where she had a lien on the

property sought to be condemned, and it was not sufficient that the trustee was summoned as an agent of the mortgagee. *New v. State Hwy. Comm'n*, 297 So. 2d 821 (Miss. 1974).

Although a trial judge has the authority to increase or decrease the time for pleading by the parties under § 11-27-7, the exercise of this prerogative is motivated only "for the good cause shown" by its

terms, thus placing the invocation of the prerogative within the discretion of the trial judge. *Coleman v. Mississippi State Hwy. Comm'n*, 289 So. 2d 918 (Miss. 1974).

Pleadings relating to value are required by § 11-27-7; and without them this chapter becomes meaningless. *Coleman v. Mississippi State Hwy. Comm'n*, 289 So. 2d 918 (Miss. 1974).

RESEARCH REFERENCES

Am Jur. 27 Am. Jur. 2d, Eminent Domain §§ 474 et seq.

7A Am. Jur. Legal Forms 2d, Eminent Domain §§ 97:41 et seq. (appraisers and appraisals).

CJS. 29A C.J.S., Eminent Domain §§ 201 et seq.

§ 11-27-9. Repealed.

Repealed by Laws, 1991, ch. 573, § 141, eff from and after July 1, 1991. [Codes, 1942, § 2749-05; Laws, 1971, ch. 520, § 5]

Editor's Note — Former § 11-27-9 pertained to the situation where the owner of the land sought to be condemned was an infant, person of unsound mind, a nonresident, or a deceased person.

§ 11-27-11. Operation of court.

The circuit clerk shall deliver a copy of said order of the court fixing the time and place for the hearing to the sheriff of the county and to the official court reporter. The sheriff shall attend the court and execute all process. The court reporter shall take the testimony. The circuit clerk, in the presence of the sheriff and chancery clerk, shall draw from the jury box of the court the names of twenty-four (24) jurors, or such numbers of jurors as shall be ordered by the court, who shall serve in said court, and shall issue a venire facias to the sheriff, commanding him to summon the jurors so drawn to appear at the time and place designated by the order of the court. All acts and actions of the clerk and sheriff, including the return endorsed on each summons issued, shall be filed by the clerk and made a part of the record in the cause.

SOURCES: Codes, 1942, § 2749-06; Laws, 1971, ch. 520, § 6, eff from and after January 1, 1972.

Cross References — Juries in condemnation proceedings, see § 13-5-89. Eminent domain proceedings, see Miss. R. Civ. P. 81.

JUDICIAL DECISIONS UNDER 1942 CODE § 2749-06

1. In general.

Principal and surety on injunction bond given in suit to restrain eminent domain proceeding held not liable for damages

consisting of fees paid jurors, who neither attended nor served. *Gwin v. City of Greenwood*, 159 Miss. 110, 131 So. 821 (1931).

RESEARCH REFERENCES

Am Jur. 27 Am. Jur. 2d, Eminent Domain §§ 606 et seq.

CJS. 29A C.J.S., Eminent Domain §§ 290 et seq.

§ 11-27-13. Separate trials; to injury or to court.

Each different property, identified by separate ownership, shall constitute a separate civil action and shall require a separate trial, unless otherwise agreed by all parties with the approval of the court. Trial shall be to a jury which shall be examined and impaneled in accordance with the Mississippi Rules of Civil Procedure. Alternatively, trial may be to the court, as provided by the Mississippi Rules of Civil Procedure.

SOURCES: Codes, 1942, § 2749-07; Laws, 1971, ch. 520, § 7; Laws, 1991, ch. 573, § 63, eff from and after July 1, 1991.

Cross References — Number of jurors in county court actions, see Miss. R. Civ. P. Eminent domain proceedings, see Miss. R. Civ. P. 81.

JUDICIAL DECISIONS

1. In general.

In an eminent domain action, the proper procedure to determine compensation under the unit valuation method is to file the petition against all persons and parties claiming an interest in the property sought to be condemned and for the jury to determine the value of the property being condemned and then to apportion the damages to the proper parties, in this case a fee holder and a leaseholder. The State Highway Commission's partial appeal from that portion of the verdict awarded to the leaseholder would be dismissed, where the Commission was not appealing the total verdict, and had already paid the portion awarded to the fee holder, who was no longer a party to the litigation. *Lennep v. Mississippi State Hwy. Comm'n*, 347 So. 2d 341 (Miss. 1977).

In condemnation proceedings where the application seeks to condemn the property of more than one defendant interested in different properties, a separate trial must be had for each and, in proceedings by an applicant for a right of way for a private road across the lands of several owners a separate trial should be granted in the circuit court to each of the several landowners to determine the damages done to the various parcels of land. *Rotenberry v. Renfro*, 214 So. 2d 275 (Miss. 1968).

Where the interests of both the landlord and his tenant in the same lands is sought to be condemned in the same action, this section [Code 1942, § 2756], requiring separate trials in the case of owners of different properties, is not applicable. *Smith v. Mississippi State Hwy. Comm'n*, 252 Miss. 883, 174 So. 2d 374 (1965).

RESEARCH REFERENCES

ALR. Necessity of trial or proceeding, separate from main condemnation trial or proceeding, to determine divided interest in state condemnation award. 94 A.L.R.3d 696.

Jury trial under Rule 71A(h) of Federal Rules of Civil Procedure (Fed. Rules Civ. Proc., Rule 71A(h), 28 U.S.C.S.) in condemnation proceedings by United States. 164 A.L.R. Fed. 341.

Dismissal, under Rule 71A(i)(3) of Federal Rules of Civil Procedure, of defendant unnecessarily or improperly joined in condemnation action. 57 A.L.R. Fed. 490.

Am Jur. 27 Am. Jur. 2d, Eminent Domain §§ 606 et seq.

CJS. 29A C.J.S., Eminent Domain §§ 281 et seq.

§ 11-27-15. Dismissal; grounds; appeal.

Any defendant may, not less than five (5) days prior to the date fixed for the hearing of the complaint and in the same court where the complaint is pending, serve and file a motion to dismiss under the Mississippi Rules of Civil Procedure for failure to state a claim upon which relief can be granted on any of the following grounds: (1) that the plaintiff seeking to exercise the right of eminent domain is not, in character, such a corporation, association, district or other legal entity as is entitled to the right; (2) that there is no public necessity for the taking of the particular property or a part thereof which it is proposed to condemn; or (3) that the contemplated use alleged to be a public use is not in law a public use for which private property may be taken or damaged. Any such motion, if served and filed, shall be heard and decided by the judge as a preference proceeding, without a jury, prior to the hearing on the complaint. Any party may appeal directly to the Supreme Court from an order overruling or granting any such motion to dismiss, as in other cases, but if the order be to overrule the motion, the appeal therefrom shall not operate as a supersedeas and the court of eminent domain may nevertheless proceed with the trial on the complaint. Any appeal from an order overruling or granting a motion to dismiss shall be a preference action in the Supreme Court and advanced on the docket as appropriate.

SOURCES: Codes, 1942, § 2749-08; Laws, 1971, ch. 520, § 8; Laws, 1991, ch. 573, § 64, eff from and after July 1, 1991.

Cross References — Separate causes of action and impaneling the jury, see § 11-27-13.

Eminent domain proceedings, see Miss. R. Civ. P. 81.

JUDICIAL DECISIONS

1. In general.
2. Appeals.

1. In general.

While the question of whether the taking of property is necessary is a legislative question which the courts should not disturb absent fraud or abuse of discretion,

the question of whether there is a public use is a judicial question without regard to legislative assertions that the use is public; thus, a trial court did not err when it determined whether a landowner's property was in fact taken for a contemplated public use without giving discre-

tion to the city legislature's determination of public necessity. *Mayor of Vicksburg v. Thomas*, 645 So. 2d 940 (Miss. 1994).

A trial court did not err by determining that the condemnor city, rather than the landowner, had the burden of proving that the landowner's property was being taken for a public use, even though the city legislature had made a determination of public necessity. *Mayor of Vicksburg v. Thomas*, 645 So. 2d 940 (Miss. 1994).

The evidence was sufficient to support a trial court's dismissal of a city's condemnation petition based on a finding of no public use where the city's contract with a gaming corporation for use of the land for the alleged purpose of urban renewal did not comply with § 43-35-19(b)'s competitive bidding requirement, and the city failed to provide conditions, restrictions, or covenants in its contract with the gaming corporation to ensure that the property would be used for the purpose of gaming enterprise or other related establishments. *Mayor of Vicksburg v. Thomas*, 645 So. 2d 940 (Miss. 1994).

In a hearing on a motion to dismiss an eminent domain action on the ground that the taking is not one for public use, the court cannot require the owners, who do not have the burden of proof on the issue of public use, to assume the burden of going forward with the evidence; to penalize owners for not doing so would be against the construction that the Supreme Court of Mississippi has stated must be placed on the eminent domain statutes. *Morley v. Jackson Redevelopment Auth.*, 632 So. 2d 1284 (Miss. 1994).

In a hearing on a motion to dismiss an eminent domain action on the ground that the taking was not one for public use, the condemnor failed to meet its burden of proof where the primary purpose of the taking was to sell the property to another private party who would develop it and the incidental purpose was to remove slum and blighted conditions in the area, and therefore an evidentiary hearing would be necessary to determine whether the use to which the land would be put

had a primarily public purpose. *Morley v. Jackson Redevelopment Auth.*, 632 So. 2d 1284 (Miss. 1994).

In a hearing on a motion to dismiss an eminent domain action on the ground that the taking was not one for public use, the mandate of Article 3, § 17 of the Mississippi Constitution that the question of public use be decided as a judicial, not a legislative, question was not complied with where there was merely a legislative assertion of public use but no evidence that the use would in fact be public. *Morley v. Jackson Redevelopment Auth.*, 632 So. 2d 1284 (Miss. 1994).

A circuit court erred in reducing the acreage of a railroad right-of-way sought to be condemned by the State for a penitentiary based on its finding that the State had shown no need for more than a short stretch of the right-of-way where the circuit court found neither fraud nor clear abuse of discretion. *Governor's Office of Gen. Servs. v. Carter*, 573 So. 2d 736 (Miss. 1990).

Under § 11-27-15, the Special Court of Eminent Domain has the power to dismiss condemnation proceedings for certain reasons, particularly if the court finds that there is no public necessity for the taking or that the use alleged to be a public use is not in law a public use for which private property may be taken; accordingly, where the Court found that no Mississippi customer would be served by a high voltage transmission line, and where the primary purpose of that line was for interstate sales, the trial judge properly dismissed a condemnation petition on the basis that there was no public necessity for the taking of the particular property or part thereof. *Mississippi Power & Light Co. v. Conerly*, 460 So. 2d 107 (Miss. 1984), appeal dismissed, 471 U.S. 1113, 105 S. Ct. 2353, 86 L. Ed. 2d 255 (1985).

2. Appeals.

An appeal may be taken immediately from a ruling on a motion to dismiss an eminent domain petition. *Winters v. City of Columbus*, 735 So. 2d 1104 (Miss. Ct. App. 1999).

RESEARCH REFERENCES

ALR. Construction and application of rule requiring public use for which property is condemned to be “more necessary” or “higher use” than public use to which property is already appropriated—state takings. 49 A.L.R.5th 769.

Am Jur. 27 Am. Jur. 2d, Eminent Domain §§ 862 et seq.

CJS. 29A C.J.S., Eminent Domain §§ 383 et seq.

Law Reviews. 1984 Mississippi Supreme Court Review: Property. 55 Miss. L. J. 135, March, 1985.

§ 11-27-17. Oath of jurors.

When the jury shall be so impaneled, the jurors shall be sworn as follows: “I do solemnly swear or affirm that as a member of this jury I will discharge my duty honestly and faithfully, to the best of my ability, and that I will a true verdict render according to the evidence, without fear, favor, or affection, and that I will be governed by the instructions of the court. So help me God.”

SOURCES: Codes, 1942, § 2749-09; Laws, 1971, ch. 520, § 9, eff from and after January 1, 1972.

Cross References — Impaneling of jury, see § 11-27-13.

Oath of petit jurors, see § 13-5-71.

Eminent domain proceedings, see Miss. R. Civ. P. 81.

§ 11-27-19. Evidence of value; award and interest.

Evidence may be introduced by either party, and the jury may, in the sound discretion of the judge, go to the premises, under the charge of the court as to conduct, conversation and actions as may be proper in the premises. Evidence of fair market value shall be established as of the date of the filing of the complaint. Any judgment finally entered in payment for property to be taken shall provide legal interest on the award of the jury from the date of the filing of the complaint until payment is actually made; provided, however, that interest need not be paid on any funds deposited by the plaintiff and withdrawn by the defendants prior to judgment. At the conclusion of the trial, the court shall instruct the jury in accordance with the Mississippi Rules of Civil Procedure.

SOURCES: Codes, 1942, § 2749-10; Laws, 1971, ch. 520, § 10; Laws, 1991, ch. 573, § 65, eff from and after July 1, 1991.

Cross References — Jury viewing the place in question, see § 13-5-91.

Eminent domain proceedings, see Miss. R. Civ. P. 81.

JUDICIAL DECISIONS

1. In general.
- 1.5. Evidence of damages in general.
2. Specific items of damages.
3. Value of land.
4. —Value for particular purpose.
5. Burden of proof.
6. View of premises.

1. In general.

Where public improvements are to be financed by a special assessment upon a class of property owners, a condemnee may not claim the present value of the assessment in diminution of the value of the remainder of his or her property after a portion has been taken. *Dear v. Madison County ex rel. Madison County Bd. of Supvrs.*, 649 So. 2d 1260 (Miss. 1995).

A trial judge in an eminent domain proceeding erred in excluding the landowners' evidence of appraised value and comparable sales of residential lots within the city limits which were zoned the same as the condemned property and which the landowners contended supported a viable valuation of their land based upon development of their property into lots for single-family residences, the use for which the property had been restricted through zoning by the municipality, and that error was exacerbated by the judge's admission into evidence of only the municipality's valuation of the landowners' property which was dependent for support upon distant sales of land that were zoned agricultural rather than residential. *Dennis v. City Council of Greenville*, 646 So. 2d 1290 (Miss. 1994).

Although the method of valuation for ad valorem tax purposes does not mirror the eminent domain concept of fair market value, some of the same factors are used in the different methods of valuation, and therefore tax appraisals are admissible to impeach the government's appraisers in an eminent domain action where the assessed valuation is related to market value. *Morley v. Jackson Redevelopment Auth.*, 632 So. 2d 1284 (Miss. 1994).

A court did not err in refusing to allow the landowners to call the court-appointed expert appraiser as a witness in an eminent domain trial. *State Hwy. Comm'n v. Hayes*, 541 So. 2d 1023 (Miss. 1989).

In an eminent domain proceeding arising from the condemnation of land for the purpose of widening a highway, the highway department counsel's repeated statements in closing argument that the jurors were citizens and taxpayers and the highway department was working for them were for the purpose of inflaming the minds of the jurors and constituted reversible error. *Dykes v. State Hwy. Comm'n*, 535 So. 2d 1349 (Miss. 1988).

Aesthetic value per se is not compensable in an eminent domain proceeding. Aesthetics enter into such a proceeding only insofar as they affect the fair market value of property. Thus, no independent damages were payable as a result of the destruction of oak trees on residential property, although a beautiful frontage of lined oak trees could affect the fair market value of residential property. *Mississippi State Hwy. Comm'n v. Viverette*, 529 So. 2d 896 (Miss. 1988).

In an eminent domain case, a comparable sale, on which an expert witness purports to rely, after the date of the taking constitutes no per se basis for objection to its admissibility in evidence or to the valuation expert relying on it and forming his opinion of value, so long as the valuation opinion ultimately given reflects the value of the property on the date of the taking. Competent appraisal and valuation experts should be expected to use and adjust both before and after comparable sales so that they form a reliable indication of value at the date of the taking. *Mississippi State Hwy. Comm'n v. Viverette*, 529 So. 2d 896 (Miss. 1988).

Courts should be particularly loath to disturb a jury's eminent domain award where the jury has personally viewed the premises. *Mississippi State Hwy. Comm'n v. Viverette*, 529 So. 2d 896 (Miss. 1988).

Mississippi recognizes before and after rule in determining measure of damages when part of tract of land is taken for public use, and while testimony as to comparable land sales is admissible in establishing fair market value of condemned property, it is error to allow jury to consider evidence of sales of non-comparable property; appraisers for land-

owner failed to establish probability that subject land would either be used within reasonable time for commercial purposes, or that there was demand for such property for those purposes. *State Hwy. Comm'n v. Smith*, 511 So. 2d 881 (Miss. 1987).

Admission of testimony of landowner regarding loss of profits was reversible error due to uncertainty and speculation involved in future of any business; testimony of landowner regarding future profits was even more speculative because landowner did not even have business located on property condemned on date of filing of application for special court of eminent domain. *State Hwy. Comm'n v. Smith*, 511 So. 2d 881 (Miss. 1987).

Eminent domain award sustained where jury had personally viewed premises, court expressing view that any substantial evidence in record supporting jury's damage assessment would preclude reversal where such viewing had occurred. *State Hwy. Comm'n v. Havard*, 508 So. 2d 1099 (Miss. 1987).

Fair market value of property taken and damage to remainder are components of due compensation; while such items as noise attributable to increased traffic and increased proximity of highway to residents may not form distinct elements of damage, such matters may be considered in so far as they impair fair market value of property remaining after taking, and question of whether following taking it may be more difficult to maneuver automobile in and out is matter that may affect fair market value of the property remaining after taking. *State Hwy. Comm'n v. Havard*, 508 So. 2d 1099 (Miss. 1987).

The Supreme Court is particularly loath to disturb a jury's condemnation award where the jury has personally viewed the property being taken. *Anderson v. Guy*, 488 So. 2d 782 (Miss. 1986).

The just compensation in a partial land taking case is generally the value of the part taken plus all damages which the residue of the property suffers, including a diminution in the value of the remainder. *Anderson v. Guy*, 488 So. 2d 782 (Miss. 1986).

There is no talismanic test which can mechanically be applied to determine

whether one can give an opinion regarding value in an eminent domain proceeding; all that is necessary is that the witness establish his substantial familiarity with the fair market value of properties of the type in issue and a like familiarity with the property in issue. *Anderson v. Guy*, 488 So. 2d 782 (Miss. 1986).

Sale of leasehold interest in a sawmill which had 20 years to run with an option to renew for an additional 20 years could be considered as a comparable sale in a proceeding to take sawmill property. *Anderson v. Guy*, 488 So. 2d 782 (Miss. 1986).

A partial taking which rendered the remainder unsuitable for continued use as a sawmill, the property's highest and best use, represented a loss bearing significantly on the owner's due compensation. *Anderson v. Guy*, 488 So. 2d 782 (Miss. 1986).

The condemnor has the burden of proving the value of the condemned property. *Ellis v. Mississippi State Hwy. Comm'n*, 487 So. 2d 1339 (Miss. 1986).

While transactions regarding the property to be taken—whether sales or secured transactions—may be the subject of testimony in condemnation proceedings, such testimony may be given only by one having proper knowledge and after proper foundation has been laid. *Ellis v. Mississippi State Hwy. Comm'n*, 487 So. 2d 1339 (Miss. 1986).

Trial judge may refuse to admit videotape depicting property involved in eminent domain proceedings where jury has had actual viewing of premises. *Trustees of Wade Baptist Church v. Mississippi State Hwy. Comm'n*, 469 So. 2d 1241 (Miss. 1985).

Neither access to property remaining after taking for public road nor parking on property are attributes or capabilities of land subject to separate valuation in eminent domain proceedings; they may be considered only insofar as they affect value of property remaining after taking. *Trustees of Wade Baptist Church v. Mississippi State Hwy. Comm'n*, 469 So. 2d 1241 (Miss. 1985).

In an eminent domain proceeding, Miss Code § 11-27-19 was the proper statute applicable for the jury to view the premises. *Smith v. Mississippi State Hwy. Comm'n*, 423 So. 2d 808 (Miss. 1982).

It is ordinarily wise to afford the property owner a jury view in eminent domain cases and inconvenience alone must be regarded as an insubstantial reason for refusing a view. *Barrett v. State Hwy. Comm'n*, 385 So. 2d 627 (Miss. 1980).

Under the quick-take law (Code 1972, §§ 11-27-81 through 11-27-91), the defendants have the absolute right to withdraw the funds deposited by the petitioner subject only to the order of the court as to their distribution, and the petitioner has no further control of the funds and no right to withdraw them after they are deposited; under these circumstances, the petitioner should not and is not required to pay interest on the amount deposited after the date of its deposit. *Mississippi State Hwy. Comm'n v. Owen*, 310 So. 2d 920 (Miss. 1975).

In arriving at fair market value of entire tract before taking, evidence of the reproduction cost of buildings on the property taken is admissible as a factor to be considered by the jury in arriving at a fair market value; although whether testimony relative to the reproduction cost is admissible in a given case lies largely in the sound discretion of the trial judge, such testimony is always admissible when it is established that the improvements are reasonably adapted to the land and the depreciated value of the improvement adds to the value of the entire property by the amount of their depreciated value; when such testimony is admitted, the condemnor is entitled to an instruction that such testimony is not evidence of market value but only a factor to be considered along with the other testimony in arriving at a fair market value. *Mississippi State Hwy. Comm'n v. Owen*, 308 So. 2d 228 (Miss. 1975), corrected, 310 So. 2d 920 (Miss. 1975).

In the absence of a provision for a setoff of rental income against the interest earned on a judgment, the owner of property being condemned who derives income from the property after the petition is filed is not required to reduce the interest by the amount collected. *Redevelopment Auth. v. Holsomback*, 291 So. 2d 712 (Miss. 1974).

1.5. Evidence of damages in general.

A judgment in an eminent domain proceeding would be reversed and remanded

where the only evidence of fair market value presented by the county was a two year old appraisal and the appraiser testified that her outdated figures pertaining to value could not possibly have accurately reflected the value of the property on the critical date. *Williamson v. Lowndes County*, 723 So. 2d 1231 (Ct. App. 1998).

Although no error was committed in permitting one of the condemnees to testify as to the before and after value of property, a portion of which was sought to be condemned, the fact that the witness admitted that she did not have "any reasonable basis" for her opinion rendered her testimony valueless insofar as the determination of damages was concerned. *Murray v. Borden Co.*, 186 So. 2d 238 (Miss. 1966).

It was reversible error to admit, in an action for the acquisition of a highway right of way, testimony that the United States government was paying 90 percent of the cost of the project. *Mississippi State Hwy. Comm'n v. Nixon*, 253 Miss. 636, 178 So. 2d 680 (1965).

A judgment awarding damages in an eminent domain proceeding will be reversed where as a whole so much incompetent, irrelevant, and immaterial evidence was admitted on behalf of the landowner, having nothing to do with the value of the property to be taken and introduced solely for the purpose of prejudicing the jury and over the objection of the condemnor, that there could not have been a fair trial. *Mississippi State Hwy. Comm'n v. Deavours*, 251 Miss. 552, 170 So. 2d 639 (1965).

In an eminent domain proceeding by the state highway department for the condemnation and appropriation of landowner's home place where the evidence as to the value of the land taken was in conflict, an award, based on a jury verdict, in favor of the landlord was affirmed by an equally divided vote of the justices. *Mississippi State Hwy. Comm'n v. Gabbert*, 238 Miss. 687, 119 So. 2d 774 (1960).

In an appeal from the award of damages by a special court of eminent domain for the taking of a public highway right of way through landowner's land, trial court correctly instructed for the county that

the jury in arriving at its verdict should not consider any elements of inconvenience or other elements which were speculative and remote. *Rasberry v. Calhoun County*, 230 Miss. 858, 94 So. 2d 612 (1957).

No verdict for larger sum than amount of damage to owners for land taken as estimated by witnesses for owner who properly qualifies their testimony by the before and after value should be permitted to stand. *Mississippi State Hwy. Comm'n v. Burwell*, 206 Miss. 490, 39 So. 2d 497 (1949), corrected, 206 Miss. 490, 40 So. 2d 263 (1949).

Under unusual conditions where the before and after values test is inapplicable to the peculiar facts, the court will adopt a rule supported by reason, logic and common sense, designed to result, as far as may be humanly possible, in ascertainment of true, accurate damage suffered by property owner. *Baker v. Mississippi State Hwy. Comm'n*, 204 Miss. 166, 37 So. 2d 169 (1948).

It was the province of the jury to fix damages from conflicting testimony in condemnation proceedings by state highway commission. *Mississippi State Hwy. Comm'n v. Treas*, 197 Miss. 670, 20 So. 2d 475 (1945).

The formula or the rule of before and after taking must be construed in connection with the facts of the case the court is then considering and the particular questions there presented for decision. *Mississippi State Hwy. Comm'n v. Hillman*, 189 Miss. 850, 198 So. 565 (1940).

An instruction on the measure of damages in an eminent domain proceeding that it is the difference between the fair market value of the property before taking and the fair market value of what remained after the land was taken and a public road constructed, cannot be complained of by the parties to the proceeding because it failed to include the qualification that general benefits and injuries shared by the general public should not be considered, and that the market value of the land must be that immediately before and after the taking, since the landowner requested such instruction and the highway commission, seeking condemnation, was not harmed thereby where there was

no evidence by the commission as to general benefits and no evidence by the landowner as to general injuries. *Mississippi State Hwy. Comm'n v. Hillman*, 189 Miss. 850, 198 So. 565 (1940).

Evidence of remote damage excluded. *Board of Levee Comm'rs v. Lee*, 85 Miss. 508, 37 So. 747 (1905).

A judgment for damages for land taken and damaged will not be disturbed on the ground that it is excessive when under the evidence a judgment for a much larger sum might have been given. *Board of Levee Comm'rs v. Lee*, 85 Miss. 508, 37 So. 747 (1905).

2. Specific items of damages.

Although there is a danger in admitting testimony as to specific items of damage in an eminent domain proceeding, in that it could result in the pyramiding of damages by the jury, such testimony is competent when related to the before and after value rather than as a basis for a separate verdict, and in a proceeding involving the taking of a grocery store, testimony as to the cost of removing the stock of goods and store fixtures from the premises was admissible, as a consequence of the taking and as an element of damage. *Blackwelder v. Bryant*, 246 So. 2d 512 (Miss. 1971).

In an eminent domain proceeding for a right of way for a public highway which ran diagonally through a 70-acre tract, used by the landowner principally for growing timber, where admittedly the existing fence was in bad condition, evidence concerning the alleged necessity of fencing each side of the right of way, its cost, and its bearing upon the after-taking value of the remaining land, was properly excluded. *Rasberry v. Calhoun County*, 230 Miss. 858, 94 So. 2d 612 (1957).

In highway condemnation proceedings involving inconvenience to existing owner and in driving his cattle and stock over, and in going to and from a part of his farm across, the proposed highway, testimony as to the effect of such inconvenience as it affected the before and after market value of the remaining property, plus the value of the property actually taken, was in accordance with the correct rule. *Mississippi State Hwy. Comm'n v. Dodson*, 207 Miss. 229, 42 So. 2d 179 (1949).

The fact that farm buildings would have to be moved or rebuilt in order to face a new highway as they had faced an old highway is not a proper element of damages. *Mississippi State Hwy. Comm'n v. Loper*, 33 So. 2d 288 (Miss. 1948).

While a witness in testifying as to damages for the taking of a strip of land which would divide the owner's property into two segments may take into consideration any necessary inconvenience that would probably be taken into consideration by a prospective purchaser, the witness may not place his estimate on the inconvenience to the present landowner. *Mississippi State Hwy. Comm'n v. Dodson*, 203 Miss. 10, 33 So. 2d 287 (1948).

Landowner, in condemnation proceedings, cannot recover damages for specific injuries to his remaining land, but evidence of such injuries is competent if, but not unless, such would affect the market value of the remaining land. *Mississippi State Hwy. Comm'n v. Treas*, 197 Miss. 670, 20 So. 2d 475 (1945).

Admitting evidence, in proceeding to condemn highway right of way, of specific injuries to remaining land, such as cost of rebuilding and removing barns and silo, digging new pools, and constructing three miles of fence, was not error where landowner was careful to connect the specific items of cost with, and have witnesses consider them only as bearing upon, market value of the remaining land. *Mississippi State Hwy. Comm'n v. Treas*, 197 Miss. 670, 20 So. 2d 475 (1945).

Question in condemnation proceeding of prior interest and rate thereof, as element of damage, should have been admitted to and passed upon by the jury, and the amount of the verdict constituted the total damage fixed by the jury, and the trial judge had no power to add thereto prior interest, nor to fix the rate thereof. *Mississippi State Hwy. Comm'n v. Treas*, 197 Miss. 670, 20 So. 2d 475 (1945).

Where the rule that the measure of damages in an eminent domain proceeding is the difference between the fair market value of the property before the taking and the fair market value after the taking, is applicable, the owner of the land cannot recover damages for specific injuries to the remaining land, although evidence of such

injuries is competent if, but not unless, they would affect the market value of the remaining land. *Mississippi State Hwy. Comm'n v. Hillman*, 189 Miss. 850, 198 So. 565 (1940).

A witness testifying as to the market value of the land before the taking for the construction of a highway and the market value after the taking, should not have been permitted in arriving at the latter value to take into consideration specific items of injury to the remaining land and the expense incurred thereby as separate elements of damages. *Mississippi State Hwy. Comm'n v. Hillman*, 189 Miss. 850, 198 So. 565 (1940).

Evidence by landowner in an eminent domain proceeding to condemn land for the construction of a highway that the State Highway Commission had been requested, but refused, to construct a passageway under the highway connecting the two separate portions of the landowner's property, and that if it had been constructed the damages would have been greatly reduced thereby, should not have been admitted, since the Commission was under no duty to construct such an underpass. *Mississippi State Hwy. Comm'n v. Hillman*, 189 Miss. 850, 198 So. 565 (1940).

In eminent domain, permitting jury to consider evidence of danger to cattle and people crossing highway in arriving at depreciation of value of farm, held error. *State Hwy. Comm'n v. Day*, 181 Miss. 708, 180 So. 794 (1938).

In determining damages to a farm by the building of a railroad across it, proof that laborers would stop to look at the train, teams would run away, that livestock would likely be killed by running trains, and foreign grasses would scatter over the farm, are not to be considered as elements of damage. *Yazoo & Miss. V. Ry. v. Jennings*, 90 Miss. 93, 43 So. 469, 122 Am. St. R. 312 (1907).

The opinions of witnesses as to what would be the yield in crops of the lands are inadmissible. *Board of Levee Comm'rs v. Hendricks*, 77 Miss. 483, 27 So. 613 (1900).

3. Value of land.

Where the condemnees' appraiser, who had no knowledge of the value of the land

prior to condemnation, was permitted to testify as to the value of the land, but the court held the testimony to be incompetent and instructed the jury to disregard it, and there was no reason to believe that the jury failed to heed the court's admonition, introduction of the testimony worked no prejudice to the condemnor. *Mississippi State Hwy. Comm'n v. Reeves*, 257 So. 2d 527 (Miss. 1972).

In arriving at the before and after value in an eminent domain proceeding, a witness may testify as to any injuries which depreciate the value of the remaining land, provided that the witness connects such injuries with the before and after value and considers them not as a specific item of damage but as bearing on such market value. *Mississippi State Hwy. Comm'n v. McArn*, 246 So. 2d 512 (Miss. 1971).

A jury verdict in excess of \$600 per acre for cut-over timber land was so excessive as to indicate that the jury was influenced by bias, passion or prejudice in arriving at such a valuation on property taken for highway right of way purposes. *Mississippi State Hwy. Comm'n v. Trammell*, 252 Miss. 413, 174 So. 2d 359 (1965).

The land with which the subject land is being compared does not have to be of the same size or acreage, or approximately so, if the other criteria essential to a fair comparison are present, for to hold otherwise would make it almost impossible to find a comparable tract of land for sale which could be used as a means of evaluating the fair market value or due compensation of the land to be taken. *Pearl River Valley Water Supply Dist. v. Wood*, 252 Miss. 580, 172 So. 2d 196 (1965).

Evidence of the price paid for condemned land in a sale prior to the proceeding in which the condemnation is sought, and especially evidence as to the purchase price paid by the condemnee, is admissible generally, at least where the sale is voluntary and is not too remote in point of time. *Mississippi State Hwy. Comm'n v. Hillcrest Farm, Inc.*, 252 Miss. 154, 171 So. 2d 491 (1965).

The cost of removing personal property from the premises condemned may be shown as bearing upon the question of value. *Mississippi State Hwy. Comm'n v.*

Rogers, 242 Miss. 439, 136 So. 2d 216 (1961).

The mere fact that \$15,000 had never been paid for a home in a community in which the condemned property was located was not evidence that the condemnee's property was not worth that amount. *Mississippi State Hwy. Comm'n v. Gabbert*, 238 Miss. 687, 119 So. 2d 774 (1960).

In eminent domain actions the opinions of experts as to values are not to be passively received and blindly followed, but are to be weighed by the jury and judged in view of all of the testimony in the case and the jury's own general knowledge of affairs, and are to be given only such consideration as the jury may believe them entitled to receive. *Warren County v. Harris*, 211 Miss. 80, 50 So. 2d 918 (1951).

In an eminent domain suit involving the taking by the county for highway purposes of a small strip of land, the jury is not required to accept the opinion evidence of an expert witness who testifies for the landowner of the county. *Warren County v. Harris*, 211 Miss. 80, 50 So. 2d 918 (1951).

Damages of \$5,000 for a condemned highway right of way across middle of a farm for a distance of a mile and a half, consisting of 35.1 acres, was sustained by the evidence, where witnesses estimated the value of the land taken and the reduced value of that remaining at from \$2,000 to \$15,000, especially where jurors personally inspected and examined the land. *Mississippi State Hwy. Comm'n v. Treas*, 197 Miss. 670, 20 So. 2d 475 (1945).

In an eminent domain proceeding it is competent for a witness, familiar with the land sought to be taken, to testify about the crops which had been produced on it, its location, distance from transportation facilities, and the character of the soil, and therefrom to give his opinion of the value, although he is not an expert. *Board of Levee Comm'rs v. Nelms*, 82 Miss. 416, 34 So. 149 (1903).

Deeds to neighboring lands are not admissible in evidence in condemnation proceedings. *Board of Levee Comm'rs v. Nelms*, 82 Miss. 416, 34 So. 149 (1903).

Sales of neighboring lands of like quality as that sought to be condemned and

prices actually paid, may be proved in condemnation proceedings in order to weaken opinions of value. *Board of Levee Comm'rs v. Nelms*, 82 Miss. 416, 34 So. 149 (1903).

Opinion evidence of the value of the lands sought to be taken is admissible in condemnation proceedings although no sales of neighboring lands have been made. *Board of Levee Comm'rs v. Nelms*, 82 Miss. 416, 34 So. 149 (1903).

The selling cash value of lands should be awarded the owner and not its theoretical value as gathered from the opinion of witnesses. *Board of Levee Comm'rs v. Hendricks*, 77 Miss. 483, 27 So. 613 (1900).

4. —Value for particular purpose.

It is reversible error to admit evidence of the adaptability of land to a particular purpose where no immediate need or prospect of its being used for such purpose was disclosed by the evidence. *Mississippi State Hwy. Comm'n v. Hall*, 252 Miss. 863, 174 So. 2d 488 (1965).

The testimony of an expert witness introduced on behalf of the landowner that property used exclusively for the growing of timber was worth \$715 per acre, exclusive of the timber, was so unreasonable that it was completely unbelievable and should have been excluded. *Mississippi State Hwy. Comm'n v. Ratcliffe*, 251 Miss. 785, 171 So. 2d 356 (1965).

In eminent domain proceeding, adaptability of land for particular purpose is immaterial unless present market value is enhanced thereby. *State Hwy. Comm'n v. Brown*, 176 Miss. 23, 168 So. 277 (1936).

Evidence of the value of the land as a steamboat landing is competent. *Board of Levee Comm'rs v. Lee*, 85 Miss. 508, 37 So. 747 (1905).

5. Burden of proof.

In action by owner, or lessee, against State Highway Commission for damages to plaintiff's property and business resulting from raising of grade of highway adjoining plaintiff's property, burden is on plaintiff to show legal damage and extent thereof. *Baker v. Mississippi State Hwy. Comm'n*, 204 Miss. 166, 37 So. 2d 169 (1948).

Burden of proof is on condemnor on issue of damages sustained by the taking. *Mississippi State Hwy. Comm'n v. Treas*, 197 Miss. 670, 20 So. 2d 475 (1945).

While providing that evidence may be introduced by either party, this section [Code 1942, § 2759] fails to fix the burden of proof; however, the party who has the burden of proof may be determined by considering which would succeed if no evidence was offered, and by examining what would be the effect of striking out of the record the allegations to be proved, the onus being on the party who, under such test, would fail. *Mississippi State Hwy. Comm'n v. Hillman*, 189 Miss. 850, 198 So. 565 (1940).

In an eminent domain proceeding by the state highway commission to condemn land for the construction of a state highway, the burden of proof on the question of damages was on the highway commission, and the court below did not err in refusing an instruction that the burden of proof was upon the landowner to establish by a preponderance of the evidence the damages sustained by the taking of the property for a public highway. *Mississippi State Hwy. Comm'n v. Hillman*, 189 Miss. 850, 198 So. 565 (1940).

On the question of burden of proof, in a case wherein the highway commission seeks to condemn land, the commission could not stop by simply showing what it wanted for a right of way without going into the question of damages to the landowner, and therefore it must make out its case before the landowner is called on to introduce evidence. *Mississippi State Hwy. Comm'n v. Hillman*, 189 Miss. 850, 198 So. 565 (1940).

6. View of premises.

A jury is not required to enter the subject property in order for a jury viewing to be sufficient. *Ford v. Destin Pipeline Co.*, 809 So. 2d 573 (Miss. 2000).

Under the facts of the case there was no abuse of discretion on the part of the trial court in permitting the jury to view the property. *Murray v. Borden Co.*, 186 So. 2d 238 (Miss. 1966).

In an appeal from an award of damages by special court of eminent domain for the taking of a public highway right of way through landowner's land, trial court's in-

struction, advising the jury that the purpose of the view was to enable it to have a more intelligent understanding of the land and the location of the proposed road, was proper, where the jury was further advised to consider all the other evidence along with its observations. *Rasberry v. Calhoun County*, 230 Miss. 858, 94 So. 2d 612 (1957).

Although following the award of damages for the taking of a right of way for a public highway through the landowner's

tract in the special court of eminent domain, the county had proceeded to clear most of the right of way and cut the trees off it, in view of landowner's evidence that the timber which had been upon the right of way was the same as that upon the remainder of the landowner's tract, the district court did not err in permitting the jury to view and inspect the land. *Rasberry v. Calhoun County*, 230 Miss. 858, 94 So. 2d 612 (1957).

RESEARCH REFERENCES

ALR. Eminent domain: valuation of land and improvements and fixtures thereon separately or as unit. 1 A.L.R.2d 878.

Elements and measure of lessee's compensation for taking or damaging leasehold in eminent domain. 3 A.L.R.2d 286.

Unity or contiguity of properties essential to allowance of damages in eminent domain proceedings on account of remaining property. 6 A.L.R.2d 1197.

Compensation for, or extent of rights acquired by, taking of land, as affected by condemner's promissory statements as to character of use or undertakings to be performed by it. 7 A.L.R.2d 364.

Unaccepted offer for purchase or sale of real property as evidence of value. 7 A.L.R.2d 781.

Elements and measure of compensation in eminent domain for temporary use and occupancy. 7 A.L.R.2d 1297.

Admissibility in condemnation proceedings of opinion evidence as to probable profits derivable from land condemned if devoted to particular agricultural purposes. 16 A.L.R.2d 1113.

Liability of condemner in eminent domain proceedings for fees of expert witnesses who testified for property owner. 18 A.L.R.2d 1225.

Admissibility, in condemnation proceeding, of evidence as to price paid for property during pendency of proceeding. 55 A.L.R.2d 781.

Admissibility, in condemnation proceeding, of evidence as to price paid on prior sale. 55 A.L.R.2d 791.

Right to open and close argument in trial of condemnation proceedings. 73 A.L.R.2d 618.

View by jury in condemnation proceedings. 77 A.L.R.2d 548.

Propriety and effect, in eminent domain proceeding, of instruction to the jury as to landowner's unwillingness to sell property. 20 A.L.R.3d 1081.

Propriety and effect of argument or evidence as to financial status of parties in eminent domain proceeding. 21 A.L.R.3d 936.

Good will or "going concern" value as element of lessee's compensation for taking leasehold in eminent domain. 58 A.L.R.3d 566.

Loss of liquor license as compensable in condemnation proceeding. 58 A.L.R.3d 581.

Compensation for diminution in value of the remainder of property resulting from taking or use of adjoining land of others for the same undertaking. 59 A.L.R.3d 488.

Eminent domain: Consideration of fact that landowner's remaining land will be subject to special assessment in fixing severance damages. 59 A.L.R.3d 534.

Good will as element of damages for condemnation of property on which private business is conducted. 81 A.L.R.3d 198.

Eminent domain: right of owner of land not originally taken or purchased as part of adjacent project to recover, on enlargement of project to include adjacent land, enhanced value of property by reason of proximity to original land-state cases. 95 A.L.R.3d 752.

Un sightliness of powerline or other wire, or related structure, as element of damages in easement condemnation proceeding. 97 A.L.R.3d 587.

Running of interest on judgment where both parties appeal. 11 A.L.R.4th 1099.

Sufficiency of condemnor's negotiations required as preliminary to taking in eminent domain. 21 A.L.R.4th 765.

Eminent domain: compensability of loss of view from owner's property-estate cases. 25 A.L.R.4th 671.

Eminent domain: compensability of loss of visibility of owner's property. 7 A.L.R.5th 113.

What law determines just compensation when licensee of Federal Power Commission exercises power of eminent do-

main in federal court under § 21 of Federal Power Act (16 USCS § 814). 51 A.L.R. Fed. 929.

Method of determining rate of interest allowed on award to owner of property taken by United States in eminent domain proceeding. 56 A.L.R. Fed. 477.

Am Jur. 27 Am. Jur. 2d, Eminent Domain §§ 668 et seq.

CJS. 29A C.J.S., Eminent Domain §§ 271 et seq.

Lawyers' Edition. No preaward interest held due in straight condemnation proceedings. 81 L. Ed. 2d 201.

§ 11-27-21. Damage to remainder; determination.

In determining damages, if any, to the remainder if less than the whole of a defendant's interest in property is taken, nothing shall be deducted therefrom on account of the supposed benefits incident to the public use for which the petitioner seeks to acquire the property.

SOURCES: Codes, 1942, § 2749-11; Laws, 1971, ch. 520, § 11, eff from and after January 1, 1972.

Cross References — Eminent domain proceedings, see Miss. R. Civ. P. 81.

JUDICIAL DECISIONS

1. In general.

Where public improvements are to be financed by a special assessment upon a class of property owners, a condemnee may not claim the present value of the assessment in diminution of the value of the remainder of his or her property after a portion has been taken. *Dear v. Madison County ex rel. Madison County Bd. of Supvrs.*, 649 So. 2d 1260 (Miss. 1995).

Fair market value of property taken and damage to remainder are components of due compensation; while such items as

noise attributable to increased traffic and increased proximity of highway to residents may not form distinct elements of damage, such matters may be considered in so far as they impair fair market value of property remaining after taking, and question of whether following taking it may be more difficult to maneuver automobile in and out is matter that may affect fair market value of the property remaining after taking. *State Hwy. Comm'n v. Havard*, 508 So. 2d 1099 (Miss. 1987).

RESEARCH REFERENCES

ALR. Compensation for diminution in value of the remainder of property resulting from taking or use of adjoining land of others for the same undertaking. 59 A.L.R.3d 488.

Eminent Domain: consideration of fact that landowner's remaining land will be subject to special assessment in fixing

severance damages. 59 A.L.R.3d 534.

Eminent domain: unity or contiguity of separate properties sufficient to allow damages for diminished value of parcel remaining after taking of other parcel. 59 A.L.R.4th 308.

Am Jur. 26 Am. Jur. 2d, Eminent Domain §§ 420 et seq.

4 Am. Jur. Proof of Facts, Eminent Domain, Proof No. 1 (damages from taking of property in eminent domain).

CJS. 29A C.J.S., Eminent Domain §§ 166 et seq.

§ 11-27-23. Verdict.

In the trial of all cases provided for herein, nine (9) jurors may bring in a verdict as in other civil cases. The verdict of the jury shall be in the following form: "We, the jury, find that the defendant (naming him) will be damaged by the acquisition of his property for the public use, in the sum of _____ Dollars."

SOURCES: Codes, 1942, § 2749-12; Laws, 1971, ch. 520, § 12, eff from and after January 1, 1972.

Cross References — Nine jurors returning a verdict in civil cases, see § 13-5-93. Eminent domain proceedings, see Miss. R. Civ. P. 81.

JUDICIAL DECISIONS

1. In general.

Under this section, the only issue for a jury to determine in an eminent domain proceeding is the amount the owner will be damaged by the acquisition of his property for the public use. If damage to other property of the owner occurs during construction on the property taken for public use, such damage is the subject matter of a separate lawsuit. *Berry v. United Gas Pipe Line Co.*, 370 So. 2d 235 (Miss. 1979).

In an eminent domain proceeding a directed verdict against the owner of a leasehold interest and an instruction to the jury to find for the land owners alone were erroneous; the jury should have apportioned the damages reached in their single verdict between the lessee and the land owner. *Seago Enters., Inc. v. Mississippi State Hwy. Comm'n*, 330 So. 2d 588 (Miss. 1976).

§ 11-27-25. Judgment.

Upon the return of the verdict, the court shall enter a judgment as follows, viz: "In this case the claim of (naming him or them) to have condemned certain lands named in the complaint, to-wit: (here describe the property), being the property of (here name the owner), was submitted to a jury composed of (here insert their names) on the _____ day of _____, A. D., _____, and the jury returned a verdict fixing said defendant's compensation and damages at _____ Dollars, and the verdict was received and entered. Now, upon payment of the said award, with legal interest from the date of the filing of the complaint, ownership of the said property shall be vested in plaintiff and it may be appropriated to the public use as prayed for in the complaint. Let the plaintiff pay the costs, for which execution may issue."

SOURCES: Codes, 1942, § 2749-13; Laws, 1971, ch. 520, § 13; Laws, 1991, ch. 573, § 66, eff from and after July 1, 1991.

Cross References — Extension of term and jurisdiction of court of eminent domain after filing of judgment, see § 11-27-29.

Eminent domain proceedings, see Miss. R. Civ. P. 81.

JUDICIAL DECISIONS

1. In general.

A default judgment should not be allowed against a condemnor on his statement of values, but the question of value should have been submitted to the jury by way of a writ of inquiry. *Coleman v. Mississippi State Hwy. Comm'n*, 289 So. 2d 918 (Miss. 1974).

By condemnation proceedings against the holder of a tax title to the land in question, the state highway commission acquired such holder's interest therein together with the right to acquire full ownership therein as against the original owner after an occupancy of three years.

Baldwin v. Mississippi State Hwy. Dep't, 187 Miss. 642, 193 So. 789 (1940).

Where the state highway commission condemned a strip of land for highway purposes as against the holder of a tax title thereto, and it went into possession and occupied the same for more than three years, such period of possession without challenge on the part of the original owner destroyed the owner's right to challenge the commission's ownership, notwithstanding that the tax sale was void. *Baldwin v. Mississippi State Hwy. Dep't*, 187 Miss. 642, 193 So. 789 (1940).

RESEARCH REFERENCES

Am Jur. 27 *Am. Jur.* 2d, Eminent Domain §§ 699 et seq.

CJS. 29A *C.J.S.*, Eminent Domain §§ 339 et seq.

§ 11-27-27. Transfer of title; payment and deposits previously made.

Upon return of the verdict and entry of the judgment, the applicant shall pay to defendants, or to the clerk if defendants absent themselves, the differences between the judgment and deposits previously made, if any; shall pay the costs of court, including the cost of jury service as is otherwise provided by law for the court in which the case is tried. Then, ownership of the property described in the petition shall be vested in petitioner and it may use said property as specified in the petition. If deposits perviously made exceed the judgement, then the clerk or defendant to whom disbursement thereof has been made, as the case may be, shall pay such excess to the petitioner.

SOURCES: Codes, 1942, § 2749-14; Laws, 1971, ch. 520, § 14, eff from and after January 1, 1972.

Cross References — Eminent domain proceedings, see Miss. R. Civ. P. 81.

JUDICIAL DECISIONS

1. In general.

The fee schedule in § 25-7-13 applies to actions in eminent domain, and funds handled by the clerk in such actions are monies subject to the commission as authorized under § 25-7-13(5). Pursuant to this section, the commission awarded to the clerk may not exceed ½ of one percent; however, the amount of the commission is

to be determined by the court. In fixing the clerk's commission, the court should exercise its discretion in light of the responsibility assumed and services rendered by the clerk. The commission paid to the clerk should be paid by the condemning authority since assessment of a fee or commission may not be used to diminish the compensation received by

the landowner. *Mississippi State Hwy. Comm'n v. Herban*, 522 So. 2d 210 (Miss. 1988).

The court in the second trial of an eminent domain action erred in refusing to enter a judgment in favor of the state highway commission in the sum of \$1,200 where, after the first trial, the Commission had paid into the registry of the court the judgment amount of \$3,500, which was disbursed by the clerk to the landowners, but where the second trial, following a reversal on appeal of the first judgment, had resulted in a verdict of only \$2,300 in favor of the landowners. *Cox v. Mississippi State Hwy. Comm'n*, 386 So. 2d 1107 (Miss. 1980).

The amount of the money judgement awarded by a court of eminent domain for the taking of a right-of-way across 80 acres of land was correctly paid to the circuit clerk where the owners of tentielfths interest in the condemned property were parties to the action, but owners of the remaining two-twelfths interest were unaccounted for and were not parties to the action. *Evans v. Mississippi Power Co.*, 206 So. 2d 321 (Miss. 1968).

Where the state highway commission condemned a strip of land for highway purposes as against the holder of a tax title thereto, and it went into possession and occupied the same for more than three years, such period of possession without challenge on the part of the original owner destroyed the owner's right to challenge the commission's ownership, notwithstanding that the tax sale was void. *Baldwin v. Mississippi State Hwy. Dep't*, 187 Miss. 642, 193 So. 789 (1940).

Under Code 1892 §§ 1693 and 1696, where, after the applicant had taken an appeal, it deposited the amount of the award in court and took possession of the land, it waived its right to the appeal. *Helm & N.W.R. Co. v. Turner*, 89 Miss. 334, 42 So. 377 (1906).

Whether a mortgagee is a proper party to a condemnation proceeding, payment by a levee board to the mortgagor for land condemned, with knowledge of the mortgage, will not preclude recovery by the mortgagee. *Board of Miss. Levee Comm'rs v. Wiborn*, 74 Miss. 396, 20 So. 861 (1896).

RESEARCH REFERENCES

ALR. Condemner's waiver, surrender, or limitation, after award, of rights or part of property acquired by condemnation. 5 A.L.R.2d 724.

Charging landowner with rent or use value of land where he remains in possession after condemnation. 20 A.L.R.3d 1164.

§ 11-27-29. Appeals.

(1) Every party shall have the right to appeal directly to the Supreme Court from the judgment entered in the special court of eminent domain, whether tried in county court or circuit court, by giving notice within ten (10) days from the date of the judgment or final order entered by the court to the court reporter to transcribe the record as taken and by prepaying all costs that may be adjudged against him; and said notice to the court reporter shall be given and the costs shall be paid as is otherwise required by law for appeals to the Supreme Court. If the judgment be in excess of the sum, if any, deposited, and the plaintiff, other than the State of Mississippi or any political subdivision thereof, desires an appeal, he shall deposit a sum, or a good and sufficient surety bond with a surety company authorized to do business in the State of Mississippi acceptable to the clerk, equal to double the amount of the judgment, less the amount of the deposit, if any, which shall be held exclusively to secure all damages assessed against plaintiff. In any case where the deposit

exceeds the compensation to be paid the defendants as determined by the final judgment, the excess shall be returned to the plaintiff. If the appeal is by the defendant, it shall not operate as a supersedeas, nor shall the right of the plaintiff to enter in and upon the land and to appropriate the same to public use be delayed. If the appeal be by the State of Mississippi or any political subdivision thereof, no bond or prepayment of costs shall be required, except the Supreme Court filing fee as required by Section 25-7-3.

(2) The term of a special court of eminent domain shall begin when the court is convened as provided by statute and shall continue for ten (10) days immediately following the entry and filing of a judgement or final order with the clerk of the court, and thereafter the court shall have jurisdiction to dispose of any post trial motions or proceedings filed within said ten (10) days. The jurisdiction of a special court of eminent domain shall expire upon the entry and filing with the clerk of a final judgment or order disposing of any post trial motions or proceedings.

SOURCES: Codes, 1942, § 2749-15; Laws, 1971, ch. 520, § 15; Laws, 1978, ch. 335, § 8; Laws, 1980, ch. 366; Laws, 1991, ch. 573, § 67, eff from and after July 1, 1991.

Editor's Note — Laws, 1978, ch. 335, § 40, provides as follows:

“SECTION 40. The provisions of this act shall not apply to any case wherein a petition for appeal has been presented prior to the day this act takes effect, and such appeals shall proceed to final determination with costs collected as though these statutes relating to costs had not been amended, but the provisions hereof shall apply to all other cases then pending and hereafter filed.”

Cross References — Court of eminent domain, see § 11-27-3.

Judgment of court of eminent domain, see § 11-27-25.

Appeal to circuit court from board of supervisors or municipal authorities, see § 11-51-75.

Appeals from the county court, see § 11-51-79.

Eminent domain proceedings, see Miss. R. Civ. P. 81.

JUDICIAL DECISIONS

1. In general.

Courts should be particularly loath to disturb a jury's eminent domain award where the jury has personally viewed the premises. *Mississippi State Hwy. Comm'n v. Viverette*, 529 So. 2d 896 (Miss. 1988).

Where the appellant gave notice to the court reporter to transcribe the record within 10 days from the date of judgment pursuant to Code 1972, § 11-27-29, and a copy of the notice was filed with the clerk, as required by Code 1972, § 9-13-33, within the 45 days allowed by Code 1972, § 11-51-5, the notice was sufficient to perfect appellant's appeal. *Mississippi State Hwy. Comm'n v. Gresham*, 323 So. 2d 100 (Miss. 1975).

Where the special court of eminent domain was convened during a regular term of the county court and had only one case to try, the term of the special court ended when the final judgment in that case was entered, and the court did not have jurisdiction to hear and determine a motion for a new trial filed after the date of judgment; The motion for a new trial, therefore, did not toll the statute of limitations, which began running on the date the final judgment was entered. *Mississippi State Hwy. Comm'n v. First Methodist Church, Inc.*, 323 So. 2d 92 (Miss. 1975).

Due compensation requirements of the United States and Mississippi constitutions did not prohibit taxing a landowner

with appeal costs and damages pursuant to Code 1972, §§ 11-3-23 and 11-27-29 where he appealed from a judgment in a special court of eminent domain and was

not successful in having the award increased. *Antley v. Mississippi State Hwy. Comm'n*, 318 So. 2d 847 (Miss. 1975).

RESEARCH REFERENCES

ALR. Eminent domain: payment or deposit of award in court as affecting condemnor's right to appeal. 40 A.L.R.3d 203.

Construction and application of rule requiring public use for which property is condemned to be "more necessary" or "higher use" than public use to which

property is already appropriated—state takings. 49 A.L.R.5th 769.

Am Jur. 27 Am. Jur. 2d, Eminent Domain §§ 714 et seq.

Law Reviews. 1979 Mississippi Supreme Court Review: Civil Procedure. 50 Miss. L. J. 719, December 1979.

§ 11-27-31. Property in more than one county.

In case the property sought to be condemned be in more than one (1) county, proceedings may be instituted in either of the counties in which a part of said property is situated.

SOURCES: Codes, 1942, § 2749-16; Laws, 1971, ch. 520, § 16, eff from and after January 1, 1972.

Cross References — Eminent domain proceedings, see Miss. R. Civ. P. 81.

RESEARCH REFERENCES

Am Jur. 27 Am. Jur. 2d, Eminent Domain § 481.

§ 11-27-33. Certain takings of property excluded.

The provisions of this chapter shall not be applied to cases provided for by Section 233 of the Constitution, or to those cases covered under the provisions of Section 51-29-39, Mississippi Code of 1972.

SOURCES: Codes, 1942, § 2749-17; Laws, 1971, ch. 520, § 17, eff from and after January 1, 1972.

Cross References — Eminent domain proceedings, see Miss. R. Civ. P. 81.

§ 11-27-35. Rights-of-way across railroads.

Telephone, telegraph or street railway companies, may acquire a right-of-way across railroads by condemnation by proceeding in accordance with the provisions of this chapter. If a right-of-way across a railroad has been condemned by a telegraph, telephone or street railway company, the railroad company shall be advised of the manner in which such telephone or telegraph company proposes to erect its poles and string its wires or place plant facilities underground, and in case of a street railway company, it shall give the railroad company notice of the manner in which it proposes to construct its tracks

across the railroad, and if the railroad company shall object thereto, the public service commission shall have jurisdiction, upon complaint filed with it by the railroad company, to enter an order directing how the poles and wires or underground plant, if a telephone or telegraph company, shall be erected and strung or placed underground, and how tracks, if a street railway company, shall be constructed, and the railroad shall be crossed as ordered, and in no other manner.

SOURCES: Codes, 1942, § 2749-18; Laws, 1971, ch. 520, § 18, eff from and after January 1, 1972.

Cross References — Railroad rights of way, see §§ 77-9-169 et seq.
Eminent domain proceedings, see Miss. R. Civ. P. 81.

JUDICIAL DECISIONS UNDER 1942 CODE § 2774

1. In general.

A foreign telephone company may exercise the right of eminent domain in this

state. *Cumberland Tel. & Tel. Co. v. Yazoo & Miss. V. Ry. Co.*, 90 Miss. 686, 44 So. 166 (1907).

RESEARCH REFERENCES

ALR. Construction and application of rule requiring public use for which property is condemned to be "more necessary" or "higher use" than public use to which property is already appropriated—state takings. 49 A.L.R.5th 769.

Am Jur. 9 Am. Jur. Pl & Pr Forms (Rev), Eminent Domain, Form 31.1 (Complaint, petition, or declaration-For condemnation-By state agency-For state transportation facility).

§ 11-27-37. Right of action for expenses.

In case the plaintiff shall fail to pay the damages and costs awarded to the defendant within ninety (90) days from the date of the rendering of the final judgment, if such judgment is not appealed from, or in case the suit shall be dismissed by the plaintiff except pursuant to settlement, or the judgment be that the plaintiff is not entitled to a judgment condemning property, the defendant may recover of the plaintiff in an action brought therefor all reasonable expenses, including attorneys' fees, incurred by him in defending the suit.

SOURCES: Codes, 1942, § 2749-19; Laws, 1971, ch. 520, § 19; Laws, 1978, ch. 335, § 9; Laws, 1991, ch. 573, § 68, eff from and after July 1, 1991.

Cross References — Application of amendment relating to prepayment of lower court costs and Supreme Court filing fee, see Editor's Note to § 11-27-29.
Eminent domain proceedings, see Miss. R. Civ. P. 81.

JUDICIAL DECISIONS

1. In general.

The trial court properly denied a claim for attorney and appraiser fees and punitive damages, notwithstanding the contention that the highway commission had not paid off a \$50,000 judgment in favor of

plaintiffs within 90 days after it became final, where the commission did not know the exact amount of the judgment and damages until the issuance of a Supreme Court mandate and where it paid the amount mandated within 90 days. *Gresham v. Mississippi State Hwy. Comm'n*, 368 So. 2d 826 (Miss. 1979).

The fact that landowners whose property is taken by eminent domain are not paid the expenses of defending the suit while such expenses are paid where, *inter alia*, the condemnation proceedings are abandoned by the condemnor or the judgment is that petitioner is not entitled to condemn the property does not render this section violative of equal protection where it makes provisions for entirely different situations. *Jackson Redevelopment Auth. v. King, Inc.*, 364 So. 2d 1104 (Miss. 1978).

The provision for recovery of expenses incurred in defending condemnation proceeding dismissed by plaintiff, embraces proceedings instituted by a municipality. *Lindley v. State*, 234 Miss. 423, 106 So. 2d 684 (1958).

Under this section [Code 1942, § 2775], municipality which dismissed an eminent domain proceeding became liable for counsel and expert witness fees incurred by the landowner in preparation of a defense to the proceeding. *City of Jackson v. Lee*, 234 Miss. 502, 106 So. 2d 892 (1958).

Where an oil company brought an action to obtain a right of way for a pipe line

over owners' land, and owners instituted a proceeding resulting in a prohibition of the oil company from proceeding in a condemnation suit, the fact that pending the appeal the oil company had purchased rights of way and built its pipe line around the owners' lands did not render the question moot in view of the vital public issue of whether the oil company had a right to the taking, as well as the question of awarding damages to the landowners under this section [Code 1942, § 2775], and the fact that the oil company would be under permanent writ of prohibition in the absence of a final decision by the Supreme Court. *Ohio Oil Co. v. Fowler*, 232 Miss. 694, 100 So. 2d 128 (1958).

Where a landowner successfully obtains a writ of prohibition forever restraining the highway department from taking a parcel of land described in the original eminent domain proceedings, the fact that the application was amended and resulted in the taking of the same and additional land was immaterial, and the landowner could recover the additional cost of the proceedings under the provisions of this section [Code 1942, § 2775]. *Mississippi State Hwy. Comm'n v. Morgan*, 254 Miss. 630, 181 So. 2d 905 (1966).

Dismissal of suit by plaintiff may entitle defendant to damages. *Meridian & M.R. Co. v. Betbeze*, 111 Miss. 810, 72 So. 233 (1916).

RESEARCH REFERENCES

ALR. Liability of condemnor in eminent domain proceedings for fees of expert witnesses who testified for property owner. 18 A.L.R.2d 1225.

Attorney's fees within statute imposing upon condemnor liability for "expenses," "costs," and the like. 26 A.L.R.2d 1295.

Cost to property owner of moving personal property as element of compensation in eminent domain. 69 A.L.R.2d 1453.

Eminent domain: condemnor's liability for costs of condemnnee's expert witnesses. 68 A.L.R.3d 546.

What constitutes abandonment of eminent domain proceeding so as to charge condemnor with liability for condemnnee's expenses or the like. 68 A.L.R.3d 610.

Attorneys' fees: cost of services provided by paralegals or the like as compensable element of award in state court. 73 A.L.R.4th 938.

Law Reviews. 1979 Mississippi Supreme Court Review: Civil Procedure. 50 Miss. L. J. 719, December 1979.

§ 11-27-39. Surveys; right to enter land; liability for damages.

Railroads, street or interurban railroads, mining, lighting, power, telephone, and telegraph corporations, and all other corporations, companies, persons and associations of persons, having rights and powers to condemn property may cause to be made such examinations and surveys for their proposed railroads, lines and stations, as may be necessary to the selection of the most advantageous routes and sites, and for such purpose may, by their officers, agents and servants, enter upon the lands and waters of any person, but subject to liability for all damages done thereto.

SOURCES: Codes, 1942, § 2749-20; Laws, 1971, ch. 520, § 20, eff from and after January 1, 1972.

Cross References — Eminent domain proceedings, see Miss. R. Civ. P. 81.

JUDICIAL DECISIONS**1. In general.**

Under this section [Code 1942, § 2776] a public utility may, in good faith, enter on property without the owner's knowledge or consent, for the purpose of making a preliminary examination and survey with a view to condemnation. *Wood v. Mississippi Power Co.*, 245 Miss. 103, 146 So. 2d 546 (1962).

A public utility's right to enter on property for the purpose of examination and survey with a view to condemnation may be exercised by its independent contractor and his employee. *Wood v. Mississippi Power Co.*, 245 Miss. 103, 146 So. 2d 546 (1962).

The right to damages recognized by this section [Code 1942, § 2776] does not embrace the statutory penalty recoverable for the cutting of trees. *Wood v. Mississippi Power Co.*, 245 Miss. 103, 146 So. 2d 546 (1962).

Owner of land is not liable for the death of employee of State Highway Department, who entered under authority of this section and Code 1942, § 8023, irrespective of his negligence provided it did not amount to willful or wanton negligence since Code 1942 §§ 2776, 8023 merely

divest the intruder from the penalties of a trespasser and confer no greater rights than belong to a licensee. *Westmoreland v. Mississippi Power & Light Co.*, 172 F.2d 643 (5th Cir. 1949).

Where a state highway employee, while operating a long drilling auger to test the subsoil of a proposed highway route across a cultivated field at a point in the right of way of an electric company, was electrocuted when the auger, on being lifted, came in contact with a high voltage wire thirteen and a half feet from the ground, neither the electric company, which, so far as shown, had knowledge of the presence of the highway employee, nor the representative of the state highway department, through whom he had been engaged, was liable for his death, this section [Code 1942, § 2776] divesting the intruder of the penalties and responsibilities of a trespasser by justifying his act, but not giving him any greater rights than those belonging to a licensee, and the duty of the owner of the land to guard against injury in such cases being governed by the rules applicable to trespassers. *Roberts v. Mississippi Power & Light Co.*, 193 Miss. 627, 10 So. 2d 542 (1942).

RESEARCH REFERENCES

ALR. Condemnor's acquisition of, or right to, minerals under land taken in

eminent domain. 36 A.L.R.2d 1424.

Eminent domain: determination of just

compensation for condemnation of billboards or other advertising signs. 73 A.L.R.3d 1122.

Eminent domain: measure and elements of lessee's compensation for condemnor's taking or damaging of leasehold. 17 A.L.R.4th 337.

Am Jur. 9 Am. Jur. Pl & Pr Forms (Rev), Eminent Domain, Form 31.1 (Complaint, petition, or declaration — For condemnation — By state agency — For state transportation facility).

§ 11-27-41. Takings by hydroelectric power companies.

All companies or associations of persons incorporated or organized for the purpose of improving and developing the water power of rivers and streams for generating, distributing and selling electricity and electro-mechanical power for any purpose for which electricity or electro-mechanical power is now or may hereafter be used or applied, are empowered and authorized to exercise the right of eminent domain, as provided in the chapter on that subject, to condemn and take such lands as may be necessary for the establishment of their reservoirs, ponds, dams, and works, and the right-of-way through all lands between such reservoirs, ponds, dams and works and cities, towns and other points where light, heat or power may be consumed, to place and extend their electric wires and conductors, either underground or on poles overhead and to keep same in repair; provided that such wires and conductors shall be so constructed and placed as not to be dangerous to persons or property and to do as little injury as possible.

SOURCES: Codes, 1942, § 2749-21; Laws, 1971, ch. 520, § 21, eff from and after January 1, 1972.

Cross References — Definitions concerning public utilities, see § 21-27-11.

Grant of specific powers for rural electrification, see § 77-5-23.

Right of way over state lands in rural electrification cases, see § 77-5-47.

Eminent domain in electric power districts, see § 77-5-157.

Board of supervisors' use of eminent domain in county power development, see § 77-5-309.

Municipality condemnation proceedings, see § 77-5-441.

Eminent domain proceedings, see Miss. R. Civ. P. 81.

RESEARCH REFERENCES

ALR. Liability for overflow of water confined or diverted for public water power purposes. 91 A.L.R.3d 1065.

Am Jur. 26 Am. Jur. 2d, Eminent Domain § 79.

9 Am. Jur. Pl & Pr Forms (Rev), Eminent Domain, Form 31.1 (Complaint, petition, or declaration — For condemnation — By state agency — For state transportation facility).

§ 11-27-43. Erection and maintenance of utility poles and lines; duty of care owed to public.

(1) All companies or associations of persons incorporated or organized for the purposes set forth in Section 11-27-41 are authorized and empowered to erect, place and maintain their posts, wires and conductors along and across any of the public highways, streets or waters and along and across all

turnpikes, railroads and canals, and also through any of the public lands, and to do such clearing as may be reasonably necessary for the proper protection, operation and maintenance of such facilities, provided in all cases such authorization shall meet the requirements of the National Electrical Safety Code. The same shall be so constructed and placed as not to be dangerous to persons or property; nor interfere with the common use of such roads, streets, or waters; nor with the use of the wires of other wire-using companies; or more than is necessary with the convenience of any landowner.

(2) The duty of care owed to the public by owners and operators of public utility facilities located adjacent to a highway, road, street or bridge in this state is satisfied when:

(a) With respect to state highways, the public utility facilities comply with the provisions of the applicable edition of the National Electrical Safety Code for structure placement relative to roadways.

(b) With respect to roads, streets and bridges that are not part of the state highway system, the public utility facilities located in a public right-of-way comply with the provisions of the applicable edition of the National Electrical Safety Code for structure placement relative to roadways.

(c) With respect to roads, streets and bridges that are not part of the state highway system, the public utility facilities located on private property comply with the provisions of the applicable edition of the National Electrical Safety Code for structure placement relative to roadways.

(d) With respect to structures, appurtenances, equipment or appliances whose placement or installation is not subject to the provisions of the National Electrical Safety Code, the public utility facilities comply with the provisions of the standards in effect when the structure, appurtenance, equipment or appliance is placed, installed or located adjacent to any highway, road, street or bridge in this state, whether or not a part of the state highway system.

(3)(a) The owner of a road, street, highway or bridge, which is not itself the owner or operator of a public utility, owes no duty to the public regarding or relating to the placement or location of public utility facilities within or appurtenant to the right-of-way of the road, street, highway or bridge.

(b) The owner of private property, which is not itself the owner or operator of a public utility, owes no duty to the public regarding or relating to the placement or location of public utility facilities on or appurtenant to the private property.

(4) For the purpose of this subsection, the term “public utility facilities” means pipes, mains, conduits, cables, wires, towers, poles and other structures, equipment or appliances, whether publicly or privately owned, installed or placed adjacent to any roadway by an owner or operator of a public utility facility.

SOURCES: Codes, 1942, § 2749-22; Laws, 1971, ch. 520, § 22; Laws, 2002, ch. 412, § 1, eff from and after July 1, 2002.

Editor's Note — The reference in (4) to this “subsection” should probably be to “this section.”

Amendment Notes — The 2002 amendment designated the former paragraph as (1) and added (2) through (4).

Cross References — Municipalities' granting rights for erection of posts and wires, see § 21-27-3.

Telegraph companies erecting lines, see § 77-9-711.

Eminent domain proceedings, see Miss. R. Civ. P. 81.

JUDICIAL DECISIONS

1. In general.

Power companies are not entitled or authorized to place a power line underground unless the customer agrees to pay for such. However, a power company may violate its duty of care under Miss. Code Ann. § 11-27-43 if it fails to place high voltage lines underground at its own expense where it is feasible and practical. *Ware v. Entergy Miss., Inc.*, — So. 2d —, 2003 Miss. LEXIS 876 (Miss. Dec. 31, 2003).

To satisfy the statute, power companies are required to make sure that: (1) National Electrical Safety Code (NESC) requirements are met, (2) the poles are constructed and placed so as not to be dangerous to persons or property, (3) there is no interference with the common use of such roads, streets, waters, or with the use of the wires of other wire-using companies, and (4) the construction does not unnecessarily inconvenience any landowner. *Ware v. Entergy Miss., Inc.*, — So. 2d —, 2003 Miss. LEXIS 876 (Miss. Dec. 31, 2003).

The statute places on a utility company the continuing duty to eliminate foreseeable danger, and that duty is not obviated by the failure of the injured party or another to exercise such care unless it is determined by the factfinder that the latter's conduct was the sole proximate cause of the injury. *Mississippi Power & Light Co. v. Lumpkin*, 725 So. 2d 721 (Miss. 1998).

In determining whether the placement of a pole may be considered unreasonably dangerous such that liability may follow, the trial court should consider such factors as the structure's proximity to the roadway, the configuration of the roadway, whether the utility had notice of previous accidents of sufficient similarity to give

reasonable notice of the danger, and whether there were feasible alternative locations for the structure which were less dangerous; it will not be a bar to liability that contact with the structure occurred only after a driver, through misfortune or ordinary negligence, left the main traveled portion of the right of way. *Mississippi Power & Light Co. v. Lumpkin*, 725 So. 2d 721 (Miss. 1998).

In an action brought by a house mover against an electric company for injuries he received from coming into contact with a live power line, an instruction for defendant that if jury believed the power line in question had been erected and maintained in conformity with Code 1942, § 2778 and National Electric Safety Code there would be no liability on defendant, was erroneous and misleading for the moving of a house along a highway is not “common use of the highway,” and instruction was also contrary to rule that whether utility is negligent despite compliance with National Electric Safety Code was a question for jury. *Crouch v. Mississippi Power & Light Co.*, 193 So. 2d 144 (Miss. 1966).

The policy of the state evidenced by this provision, is to encourage the development of public utilities by affording them the right to place their lines along streets and highways. *City Council v. Thomas*, 241 Miss. 633, 131 So. 2d 659 (1961).

A power company may, with the consent of the municipal authorities, place a transmission line upon property purchased for a park, not interfering with its use as such. *City Council v. Thomas*, 241 Miss. 633, 131 So. 2d 659 (1961).

Where a right of way was conveyed to the state highway commission for highway purposes, and electric power company constructed power lines on the high-

way right of way, the landowner could recover damages on the ground that private property should not be taken or damaged for public use except on due compensation. *Berry v. Southern Pine Elec. Power Ass'n*, 222 Miss. 260, 76 So. 2d 212, 58 A.L.R.2d 508 (1954).

It is continuing duty of electric company to maintain wires over streets in manner not dangerous to persons and property. *Mississippi Power Co. v. Thomas*, 162 Miss. 734, 140 So. 227, 84 A.L.R. 679 (1932).

Electric company maintaining wires over streets and highways must exercise

highest degree of care to prevent danger. *Mississippi Power Co. v. Thomas*, 162 Miss. 734, 140 So. 227, 84 A.L.R. 679 (1932).

This section [Code 1942, § 2778] authorized power company to construct its poles and lines in and upon public highway. *Mississippi Power Co. v. Sellers*, 160 Miss. 512, 133 So. 594 (1931).

Power company held not liable where trailer on truck in which plaintiff rode, as result of reckless driving, struck pole within right of way but eight feet from traveled road. *Mississippi Power Co. v. Sellers*, 160 Miss. 512, 133 So. 594 (1931).

RESEARCH REFERENCES

ALR. Construction and application of rule requiring public use for which property is condemned to be "more necessary" or "higher use" than public use to which property is already appropriated — state takings. 49 A.L.R.5th 769.

Am Jur. 9 Am. Jur. Pl & Pr Forms (Rev), Eminent Domain, Form 31.1 (Complaint, petition, or declaration — For condemnation — By state agency — For state transportation facility).

§ 11-27-45. Power lines across railroads.

All companies, or associations of persons incorporated or organized for the purposes set forth in Section 11-27-41 may acquire a right-of-way across railroads by condemnation by the exercise of such right of eminent domain. If a right-of-way across a railroad has been condemned by a hydroelectric company, as herein defined, the railroad company shall be advised of the manner in which said hydroelectric company proposes to erect its poles and string its wires and conductors, and if the railroad company shall object thereto, the public service commission shall have jurisdiction upon complaint filed with it by the railroad company to enter an order directing how the poles, wires and conductors shall be constructed, and the railroad shall be crossed as ordered and in no other manner.

SOURCES: Codes, 1942, § 2749-23; Laws, 1971, ch. 520, § 23, eff from and after January 1, 1972.

Cross References — Eminent domain proceedings, see Miss. R. Civ. P. 81.

RESEARCH REFERENCES

ALR. Construction and application of rule requiring public use for which property is condemned to be "more necessary"

or "higher use" than public use to which property is already appropriated — state takings. 49 A.L.R.5th 769.

§ 11-27-47. Pipelines.

All companies, associations of persons, municipalities, associations of municipalities, public utility districts authorized by and under the laws of the state of Mississippi, or natural gas districts, incorporated or organized for the purpose of building or constructing pipelines and appliances for the conveying and distribution of oil or gas, including carbon dioxide or other gaseous substances for use in connection with secondary or tertiary recovery projects located within the state of Mississippi for the enhanced recovery of liquid or gaseous hydrocarbons, or for the purpose of constructing, maintaining and operating lines for transmitting electricity for lighting, heating and power purposes, or for the purpose of constructing, maintaining and operating lines and appliances, for storing, transmitting and distributing water and for transmitting, treating and disposing of sewage, and hereby empowered to exercise the right of eminent domain in the manner now provided by law, and to build and construct the said pipelines and appliances along or across highways, waters, railroads, canals and public lands, above or below ground, but not in a manner to be dangerous to persons or property, nor to interfere with the common use of such roads, waters, railroads, canals and public lands.

The board of supervisors of any county through which any such line may pass shall have the power to regulate, within its respective limits, the manner in which such lines and appliances shall be constructed and maintained on and above the highways and bridges of the county. All such companies, associations of persons, municipalities, associations of municipalities, public utility districts authorized by and under the laws of the state of Mississippi or natural gas districts shall be responsible in damages for any injury caused by such construction or use thereof.

SOURCES: Codes, 1942, § 2749-24; Laws, 1971, ch. 520, § 24; Laws, 1984, ch 420, § 2, eff from and after passage (approved April 23, 1984).

Editor's Note — Laws, 1984, ch. 420, § 1 provides as follows:

“SECTION 1. The Legislature hereby finds and declares the following:

(a) The State of Mississippi has substantial and valuable oil and gas reserves not producible by traditional recovery techniques, but which may be producible by enhanced recovery methods.

(b) It is for the public benefit and in the public interest that the maximum amount of the state's oil and gas reserves be produced to the extent that it is economically and technologically feasible.

(c) Mississippi has substantial and valuable carbon dioxide reserves.

(d) The enhanced recovery of oil and gas by the injection of carbon dioxide into oil and gas reservoirs is a promising enhanced recovery method which may result in the increased production of oil and gas in the State of Mississippi.

(e) It is for the public benefit and in the public interest that Mississippi's carbon dioxide be produced and used for the enhanced recovery of oil and gas.

(f) Pipelines are necessary to transport carbon dioxide from the place where it is produced to the place where it is used or consumed.

(g) Such pipelines will encourage production of carbon dioxide, a valuable natural resource, and encourage the enhanced production of oil and gas, all of which will be to the benefit of the State of Mississippi and its citizens and will assist in meeting the energy needs of the state and Nation.

(h) The public convenience and necessity requires that companies and other entities needing and using pipelines for the purpose of conveying, distributing or transporting carbon dioxide be empowered to exercise the power of eminent domain for the purpose of constructing and maintaining such pipelines."

Cross References — Pipes, conduits, and pipe lines, see § 21-27-5.

Laying of pipelines, see § 29-7-7.

Right of eminent domain for the purpose of constructing pipelines, see § 53-3-159.

Eminent domain proceedings, see Miss. R. Civ. P. 81.

JUDICIAL DECISIONS

1. In general.
2. Companies, associations, etc., as having power of eminent domain.
3. Exercise of power, generally.
4. Public lands.
5. Damages or compensation.

1. In general.

Although a pipeline company holding an easement across public lands had a valid property interest in such lands, its interest was subject to the statutory restriction that the lines not interfere with the state's dominion over the land for the public welfare; thus, the expense of lowering the pipeline when the state constructed a drainage canal over the easement was properly placed on the pipeline company. *State v. Michigan Wis. Pipeline Co.*, 360 So. 2d 684 (Miss. 1978).

Involving the right, as against a utility having a municipal franchise, of an electric power association to serve a portion of its certificated area after annexation to a city. *Delta Elec. Power Ass'n v. Mississippi Power & Light Co.*, 250 Miss. 482, 149 So. 2d 504 (1963), appeal dismissed, cert. denied, 375 U.S. 77, 84 S. Ct. 196, 11 L. Ed. 2d 142 (1963), reh'g denied, 375 U.S. 981, 84 S. Ct. 478, 11 L. Ed. 2d 428 (1964).

The policy of the state evidenced by this provision, is to encourage the development of public utilities by affording them the right to place their lines along streets and highways. *City Council v. Thomas*, 241 Miss. 633, 131 So. 2d 659 (1961).

This section [Code 1942, § 2780] does not require resort to condemnation proceedings where property owners or public authorities consent to use without compensation. *City Council v. Thomas*, 241 Miss. 633, 131 So. 2d 659 (1961).

The plain purpose of this section [Code 1942, § 2780] is to encourage pipe line

enterprises, and the legislative intent must be sought in the light of that purpose. *Ohio Oil Co. v. Fowler*, 232 Miss. 694, 100 So. 2d 128 (1958).

Where an oil company brought an action to obtain a right of way for a pipe line over owners' land and owners instituted a proceeding resulting in a prohibition of the oil company from proceeding in a condemnation suit, the fact that pending the appeal the oil company had purchased rights of way and built its pipe line around the owners' lands did not render the question moot in view of the vital public issue of whether the oil company had a right to the taking, as well as the question of awarding damages to the land owners under Code 1942, § 2775, and the fact that the oil company would be under permanent writ of prohibition in the absence of a final decision by the Supreme Court. *Ohio Oil Co. v. Fowler*, 232 Miss. 694, 100 So. 2d 128 (1958).

Telephone and telegraph lines which pipe line company sought to construct for use in connection with pipe line held mere "appliances" within its charter and statute respecting eminent domain. *Gandy v. Public Serv. Corp.*, 163 Miss. 187, 140 So. 687 (1932).

This section [Code 1942, § 2780], did not apply where power company placed poles along highway and truck struck pole. *Mississippi Power Co. v. Sellers*, 160 Miss. 512, 133 So. 594 (1931).

2. Companies, associations, etc., as having power of eminent domain.

The word "distribution" as used in this section [Code 1942, § 2780] includes substantial and necessary steps in the total process of distribution and the construction of a pipe line to carry condensate from

two producing fields to a refinery is a substantial and necessary step in the process of distributing the commodity transported by a common carrier. *Ohio Oil Co. v. Fowler*, 232 Miss. 694, 100 So. 2d 128 (1958).

Since there is no state regulatory authority over pipe lines for the conveyance of oil and condensate, the common law definition of common carriers would apply. *Ohio Oil Co. v. Fowler*, 232 Miss. 694, 100 So. 2d 128 (1958).

A company organized to transport condensate of oil by pipe lines is organized for public purpose for which private property may be condemned, provided that the facilities of the company are open to the public generally on equal terms; and the use is not rendered a private one by the fact that only a few persons will be served at the time the property is sought to be taken. *Ohio Oil Co. v. Fowler*, 232 Miss. 694, 100 So. 2d 128 (1958).

The public necessity for taking private property is a legislative question a determination of which may be delegated in respect to abutting lands of individuals, damages by reason of any injury caused by the construction of the line or the use of the line, and contemplates damages resulting from the use of the line in the highway right of way and not the use of the highway right of way for the location of the line. *Mississippi Valley Gas Co. v. Boydston*, 230 Miss. 11, 92 So. 2d 334 (1957).

This section [Code 1942, § 2780] grants pipe line companies the right to condemn private property. *Gandy v. Public Serv. Corp.*, 163 Miss. 187, 140 So. 687 (1932).

Corporation having power under charter of laying pipe lines to distribute gas for public purposes was "public utility corporation," and had right of eminent domain, whether it had valid franchise with city or not. *Gandy v. Public Serv. Corp.*, 163 Miss. 187, 140 So. 687 (1932).

Legislature had constitutional authority to grant right of eminent domain to pipe lines for purpose of distributing gas to public. *Gandy v. Public Serv. Corp.*, 163 Miss. 187, 140 So. 687 (1932).

3. Exercise of power, generally.

The effect of Code 1942, § 7716-05, is to make the obtaining of a certificate of pub-

lic convenience and necessity by a utility a condition of its exercise of the power of eminent domain. *Mississippi Power & Light Co. v. Blake*, 236 Miss. 207, 109 So. 2d 657 (1959).

That a cement plant will considerably benefit from extension of an electric power line does not make the taking of property for the line one for a private purpose, where there is evidence of public need for the extension. *Mississippi Power & Light Co. v. Blake*, 236 Miss. 207, 109 So. 2d 657 (1959).

An oil company proposing to operate a common carrier pipe line for the conveyance of oil and condensate from two producing fields to a refinery which had contracted to purchase the company's entire production, whose facilities would be open to the public generally, particularly to all owners of production within these fields, and had filed a tariff with the Interstate Commerce Commission, was authorized to condemn a right of way over land, notwithstanding that some 60 to 65 per cent of the oil to be conveyed was from the company's own wells. *Ohio Oil Co. v. Fowler*, 232 Miss. 694, 100 So. 2d 128 (1958).

That another company had laid pipe line over same territory did not prevent respondent from condemning land for pipe line, public policy of State, as evidenced by anti-trust statutes prohibiting municipalities from granting exclusive franchises, being to encourage competition. *Gandy v. Public Serv. Corp.*, 163 Miss. 187, 140 So. 687 (1932).

4. Public lands.

Where a statute granted the right to build and construct a pipeline across public lands, the phrase public lands includes sixteenth section school lands. *Willmut Gas & Oil Co. v. Covington County*, 221 Miss. 613, 71 So. 2d 184 (1954), appeal dismissed, 348 U.S. 891, 75 S. Ct. 215, 99 L. Ed. 700 (1954), overruled on other grounds, *State v. Michigan Wis. Pipeline Co.*, 360 So. 2d 684 (Miss. 1978).

The purpose which the legislature had in granting to public utilities the right to construct pipelines across sixteenth section lands is consistent with other analogous legislative grants. *Willmut Gas & Oil Co. v. Covington County*, 221 Miss. 613, 71

So. 2d 184 (1954), appeal dismissed, 348 U.S. 891, 75 S. Ct. 215, 99 L. Ed. 700 (1954), overruled on other grounds, *State v. Michigan Wis. Pipeline Co.*, 360 So. 2d 684 (Miss. 1978).

5. Damages or compensation.

Even if a pipeline company and a property owner entered into an agreement whereby the company agreed that no other lines would be constructed across the owner's property, it would be void as against public policy and would not support the grant of a writ of prohibition to prevent the company from exercising its right of eminent domain to acquire a second easement across the same property. *Southern Pine Wood Preserving Co. v. Brown*, 202 So. 2d 916 (Miss. 1967).

Whether a pipe line company is liable for the overturning of a negligently driven car striking a concrete post, installed as a marker, not readily visible, located on the shoulder of a highway near the edge of a ditch, about 3 ½ feet from the blacktop, held for the jury. *United Gas Pipe Line Co. v. Jones*, 236 Miss. 471, 111 So. 2d 240 (1959).

This section [Code 1942, § 2780] does not contemplate the right to recover rent for the use of the highway right of way in which a distribution line is located insofar as it applies to privately owned abutting lands, since the language "injury caused by such construction or use thereof" means, with respect to abutting lands of individuals, damages by reason of any injury caused by the construction of the line or the use of the line, and contemplates damages resulting from the use of the line in the highway right of way and not the use of the highway right of way for the location of the line. *Mississippi Valley Gas Co. v. Boydston*, 230 Miss. 11, 92 So. 2d 334 (1957).

Where an abutting property owner's predecessor in title had conveyed a high-

way right of way to the State Highway Commission, and subsequently a gas company, pursuant to permission obtained from the State Highway Commission, laid a gas distribution line wholly within the right of way, the abutting property owner was not entitled to rent from the gas company, where his property was not damaged or depreciated in value by the use of the right of way for the distribution line; nor was there violation of the abutting property owner's rights under § 17 of the Mississippi Constitution. *Mississippi Valley Gas Co. v. Boydston*, 230 Miss. 11, 92 So. 2d 334 (1957).

Where a right of way was conveyed to the state highway commission for highway purposes, and electric power company constructed power lines on the highway right of way, the landowner could recover damages on the ground that private property should not be taken or damaged for public use except on due compensation. *Berry v. Southern Pine Elec. Power Ass'n*, 222 Miss. 260, 76 So. 2d 212, 58 A.L.R.2d 508 (1954).

A phrase "damages for any use" as used in this section [Code 1942, § 2780] includes compensation for reasonable rental or use of right of way. *Willmut Gas & Oil Co. v. Covington County*, 221 Miss. 613, 71 So. 2d 184 (1954), appeal dismissed, 348 U.S. 891, 75 S. Ct. 215, 99 L. Ed. 700 (1954), overruled on other grounds, *State v. Michigan Wis. Pipeline Co.*, 360 So. 2d 684 (Miss. 1978).

An uncompensated grant by the state of an easement or right of way across a sixteenth section would be in violation of the constitution. *Willmut Gas & Oil Co. v. Covington County*, 221 Miss. 613, 71 So. 2d 184 (1954), appeal dismissed, 348 U.S. 891, 75 S. Ct. 215, 99 L. Ed. 700 (1954), overruled on other grounds, *State v. Michigan Wis. Pipeline Co.*, 360 So. 2d 684 (Miss. 1978).

ATTORNEY GENERAL OPINIONS

A county has the authority to allow municipal use of the county's road right-of-way for construction and maintenance

of municipal water mains without the necessity of an interlocal agreement. *Bobo*, June 19, 1998, A.G. Op. #98-0254.

RESEARCH REFERENCES

ALR. Eminent domain: Elements and measure of compensation for oil or gas pipeline through private property. 38 A.L.R.2d 788.

Eminent domain: cost of substitute facilities as measure of compensation to state or municipality for condemnation of public property. 40 A.L.R.3d 143.

Am Jur. 26 Am. Jur. 2d, Eminent Domain § 87.

61 Am. Jur. 2d, Pipelines §§ 18 et seq.

9 Am. Jur. Pl & Pr Forms (Rev), Eminent Domain, Form 31.1 (Complaint, petition, or declaration — For condemnation — By state agency — For state transportation facility).

Law Reviews. 1984 Mississippi Supreme Court Review: Property. 55 Miss. L. J. 135, March, 1985.

§ 11-27-48. Information from Public Service Commission.

No entity empowered under the laws of the State of Mississippi to exercise the power of eminent domain shall be required, as a condition precedent to exercising such power, to obtain from the Mississippi Public Service Commission any of the following:

(a) A determination that the entity qualifies as one to which the Legislature has granted the power of eminent domain;

(b) A determination that the entity has complied with state law in invoking the statutory power of eminent domain; or

(c) A certificate of public convenience and necessity for the particular taking in question. However, this section shall not affect or alter in any way the terms and provisions contained in Sections 77-3-13, 77-3-17 and 77-3-21.

SOURCES: Laws, 1997, ch. 453, § 1, eff from and after passage (approved March 25, 1997).

Cross References * — Mississippi Public Service Commission, see §§ 77-1-1 et seq. Eminent domain proceedings, see Miss. R. Civ. P. 81.

§ 11-27-49. Public schools.

The boards of trustees of an agricultural high school, or agricultural high school and junior college, or any municipal separate school district, and the county board of education, in the case of other school districts, are authorized and empowered to exercise the right of eminent domain, for the purpose of acquiring property to be used for school and playground purposes. However, the rights of eminent domain created hereunder shall not be used for the condemnation of the property of any school or college whatsoever, either private, fraternal, sectarian or denominational.

SOURCES: Codes, 1942, § 2749-25; Laws, 1971, ch. 520, § 25, eff from and after January 1, 1972.

Cross References — Right of eminent domain relating to underground storage of natural gas, see § 53-3-159.

Eminent domain proceedings, see Miss. R. Civ. P. 81.

JUDICIAL DECISIONS

1. In general.

The last sentence of this section [Code 1942, § 2749-25] is applicable only to prevent any enumerated school authority or school entity from taking land belonging to another school, and does not prohibit

the state highway commission from taking land belonging to a school board through eminent domain proceedings. *LaBarreare v. Lambert*, 284 So. 2d 50 (Miss. 1973).

RESEARCH REFERENCES

ALR. Amount of property which may be condemned for school. 71 A.L.R.2d 1071.

§ 11-27-51. Proceedings filed before 1972 not affected by chapter.

Nothing in this chapter shall be considered or construed to affect in any way any eminent domain proceeding filed before January 1, 1972 and such proceeding may be prosecuted to final conclusion according to the law in effect on the date such proceeding was filed, but the provisions of Section 11-27-29 relating to direct appeals to the supreme court shall apply to cases pending in any county court on January 1, 1972 wherein no appeal has been taken. Nothing in this chapter shall be construed or shall operate to negate, abridge or alter rights vested pursuant to any prior statutes repealed and reenacted hereby, or to affect judicial construction thereof.

SOURCES: Laws, 1971, ch. 520, § 27, eff from and after January 1, 1972.

Cross References — Eminent domain proceedings, see Miss. R. Civ. P. 81.

RIGHT TO IMMEDIATE POSSESSION

SEC.

- | | |
|-----------|---|
| 11-27-81. | Who may exercise right of immediate possession. |
| 11-27-83. | Institution of proceedings; appraisal of property. |
| 11-27-85. | Order granting right to immediate title and immediate entry; deposit. |
| 11-27-87. | Effect of insufficiency or excess of deposit. |
| 11-27-89. | Compensation of appraiser; right to jury trial. |
| 11-27-91. | Special funds and accounts of highway commission. |

§ 11-27-81. Who may exercise right of immediate possession.

The right of immediate possession pursuant to Sections 11-27-81 through 11-27-89, Mississippi Code of 1972, may be exercised only:

- (a) By the State Highway Commission for the acquisition of highway rights-of-way only;
- (b) By any county or municipality for the purpose of acquiring rights-of-way to connect existing roads and streets to highways constructed or to be constructed by the State Highway Commission;

(c) By any county or municipality for the purpose of acquiring rights-of-way for widening existing roads and streets of such county or municipality; provided, however, that said rights-of-way shall not displace a property owner from his dwelling or place of business;

(d) By the boards of supervisors of any county of this state for the acquisition of highway or road rights-of-way in connection with a state-aid project designated and approved in accordance with Sections 65-9-1 through 65-9-31, Mississippi Code of 1972;

(e) By the Mississippi Wayport Authority for the purposes of acquiring land and easements for the Southeastern United States Wayport Project as authorized by Sections 61-4-1 through 61-4-13, Mississippi Code of 1972;

(f) By any county or municipality for the purpose of acquiring rights-of-way for water, sewer, drainage and other public utility purposes; provided, however, that such acquisition shall not displace a property owner from his dwelling or place of business;

(g) By any county authorized to exercise the power of eminent domain under Section 19-7-41 for the purpose of acquiring land for construction of a federal correctional facility or other federal penal institution;

(h) By the Mississippi Major Economic Impact Authority for the purpose of acquiring land, property and rights-of-way for a project as defined in Section 57-75-5(f)(iv)1 or any facility related to the project as provided in Section 57-75-11(e)(ii);

(i) By the boards of supervisors of any county of this state for the purpose of constructing dams or low-water control structures on lakes or bodies of water under the provisions of Section 19-5-92; or

(j) By the board of supervisors of any county of this state for the purpose of acquiring land, property and/or rights-of-way for any project the board of supervisors, by a duly adopted resolution, determines to be related to a project as defined in Section 57-75-5(f)(iv). The board of supervisors of a county may not exercise the right to immediate possession under this item (j) after July 1, 2003.

SOURCES: Codes, 1942, § 2749-04.5; Laws, 1972, ch. 489, § 1; Laws, 1975, ch. 447; Laws, 1987 Ex Sess, ch. 24, § 19; Laws, 1989, ch. 535, § 8; Laws, 1990, ch. 470, § 1; Laws, 1994, ch. 310, § 2; Laws, 2000, 3rd Ex Sess, ch. 1, § 11; Laws, 2001, ch. 476, § 2, eff from and after passage (approved Mar. 23, 2001.)

Editor's Note — Laws, 2001, ch. 476, § 6, provides:

“SECTION 6. Nothing in this act shall be construed to require the prior approval of a levee board for the repair or construction of flood control structures in areas that are not located in a levee district area.”

Cross References — Right of boards of supervisors of certain counties to immediate possession for purpose of constructing federal penitentiary, see § 19-7-41.

Mississippi Superconducting Super Collider Authority, see §§ 57-67-1 et seq.

Mississippi Superconducting Super Collider Authority's right to immediate possession of land, see § 57-67-11.

Application to provisions of Mississippi Wayport Authority Act, see § 61-4-11.

Eminent domain proceedings, see Miss. R. Civ. P. 81.

ATTORNEY GENERAL OPINIONS

A City may, upon a factual determination that a sludge disposal facility is part of a sewer for purposes of Section 21-37-47(3), use the power of eminent domain to acquire the property to construct a sludge disposal facility. The municipality may utilize the provisions of Section 11-27-81(f) for immediate possession of rights-of-way to the facility as long as acquisition does not displace any property owner from his or her dwelling or place of business. Brown, September 29, 1995, A.G. Op. #95-0212.

Section 11-27-81 does not permit the Board of Supervisors to take immediate possession when a County desires to take possession of certain land in order to enable the state to construct a state highway. Welch, August 9, 1996, A.G. Op. #96-0402.

The “quick-take” provisions of the statute extend only within the corporate limits of the municipality; thus, there is no authority for a municipality to exercise the right to immediate possession to acquire rights-of-way to a municipal natural gas pipeline located outside the corporate limits of the municipality. Aston, April 10, 1998, A.G. Op. #98-0147.

The term “drainage and other public utility purposes” in subsection (f) encompasses work along a creek or other natural water course to lessen flooding in the municipality, and a municipality has the power pursuant to subsection (f) to take immediate possession under its right of

eminent domain of the temporary easements necessary to do the work. Phillips, September 11, 1998, A.G. Op. #98-0567.

A county board of supervisors did not have authority to exercise the right of immediate possession in the acquisition of properties to be used by county school district for athletic facilities or new construction. Smith, June 30, 2000, A.G. Op. #2000-0342.

A regional water supply district is not entitled to adopt and exercise the “quick take” powers set forth in Sections 11-27-81 through 11-27-91, as the exercise of this power is limited to specific entities for specific purposes and a water district is not one of the specific entities listed as having the power of “quick take.” Applewhite, Oct. 27, 2000, A.G. Op. #2000-0635.

Although the individual municipalities and counties that are members of a regional water management district are entitled to exercise “quick take” procedures, it would circumvent the intent of the statute if the entities having the statutory authority to use “quick take” procedures were to exercise that power for the benefit of entities without such specific authority. Applewhite, Oct. 27, 2000, A.G. Op. #2000-0635.

Rights-of-way for bridges which are part of a state-aid road project as defined in Section 65-9-1 are subject to the right of immediate possession set out in Section 11-27-81(d). Williamson, Sept. 21, 2001, A.G. Op. #01-0599.

RESEARCH REFERENCES

ALR. Locating easement of way created by necessity. 36 A.L.R.4th 769.

Am Jur. 9 Am. Jur. Pl & Pr Forms (Rev), Eminent Domain, Forms 71 et seq.

(Allowance of immediate possession; continuation of possession).

CJS. 29A C.J.S., Eminent Domain § 212.

§ 11-27-83. Institution of proceedings; appraisal of property.

If a plaintiff eligible to claim the right of immediate possession under the provisions of Sections 11-27-81 through 11-27-89 shall desire immediate possession of the property sought to be condemned, other than property devoted to a public use, the plaintiff shall so state in the complaint to condemn property filed with the circuit clerk pursuant to Sections 11-27-1 through 11-27-49, Mississippi Code of 1972, and shall therein make and substantiate

the following declaration concerning the governmental project for which the property is being condemned:

That the plaintiff shall suffer irreparable harm and delay by exercising the right to condemn said property through eminent domain proceedings pursuant to Sections 11-27-1 through 11-27-49, as opposed to claiming the right of immediate possession of said property pursuant to Sections 11-27-81 through 11-27-89.

The court, or the judge thereof in vacation, as soon as practicable after being satisfied that service of process has been obtained, shall appoint a disinterested, knowledgeable person qualified to make an appraisal of the property described in the complaint to act as appraiser. The appraiser, after viewing the property, shall return to the clerk of court within ten (10) days after his appointment, his report in triplicate, under oath, which report shall state: (1) the fair market value of the property to be condemned, determined as of the date of the filing of the complaint; (2) the damages, if any, to the remainder if less than the whole is taken, giving a total compensation and damages to be due as determined by the appraiser; and (3) his opinion as to the highest and best use of the property, and a narrative of the facts pertaining to his appraisal.

SOURCES: Codes, 1942, § 2749-04.5; Laws, 1972, ch. 489, § 1; Laws, 1986, ch. 465, § 1; Laws, 1991, ch. 573, § 69, eff from and after July 1, 1991.

Cross References — Mississippi Superconducting Super Collider Authority's right to immediate possession of land, see § 57-67-11.

Application to provisions of Mississippi Wayport Authority Act, see § 61-4-11.

Eminent domain proceedings, see Miss. R. Civ. P. 81.

JUDICIAL DECISIONS

1. In general.
2. Irreparable harm or delay.

1. In general.

The highway commission's taking of a portion of landowners' property undeniably affected the value of the remaining property where a portion of the owners' parking area was taken and they lost frontage which moved their structure closer to the roadway so that future reconstruction to the building could be affected, and therefore the highway commission should not have been allowed to have its witness base his appraisal of fair market value of the property on the value of empty lots. To establish a prima facie case of fair market value, the highway commission was required to base its valuation on comparable sales of property which contained a building and which took into

account the partial loss of the parking lot. *Howell v. State Hwy. Comm'n*, 573 So. 2d 754 (Miss. 1990).

In a "quick take" eminent domain proceeding, the trial court acted properly in not allowing the landowner to call the court-appointed expert appraiser as a witness. *State Hwy. Comm'n v. Culpepper*, 536 So. 2d 18 (Miss. 1988).

In an eminent domain proceeding under § 11-27-83 in which the state acquired .18 of an acre of land leased by a church, the trial court erred in ordering a \$10,000 additur to the jury verdict of \$7,500 where the church would not lose any building or permanent structure on the taken property, the state had no plans to pave the land taken or place any structure upon it, the highest and best use of the property was for church purposes and not for commercial purposes, and the land taken was

property in which the church only held a remaining 20-year leasehold interest. *Mississippi State Hwy. Comm'n v. Antioch Baptist Church, Inc.*, 392 So. 2d 512 (Miss. 1981).

2. Irreparable harm or delay.

A loss of federal funding occasioned by delay can justify a finding of irreparable harm or delay. *Winters v. City of Columbus*, 735 So. 2d 1104 (Miss. Ct. App. 1999).

RESEARCH REFERENCES

Am Jur. 9 Am. Jur. Pl & Pr Forms (Rev), Eminent Domain, Forms 71 et seq. (Allowance of immediate possession; continuation of possession).

9 Am. Jur. Pl & Pr Forms (Rev), Eminent Domain, Forms 91 et seq. (Appointment of commissioners).

9 Am. Jur. Pl & Pr Forms (Rev), Eminent Domain, Forms 111 et seq. (Report of commissioners).

7 Am. Jur. Legal Forms 2d, Eminent Domain § 97:36 (Appraiser's affidavit of value of interest in land).

§ 11-27-85. Order granting right to immediate title and immediate entry; deposit.

(1) Upon the filing of the report of the appraiser, the clerk shall within three (3) days mail notice to the parties and the court that the report has been filed. The court shall review the report of the appraiser and shall, after not less than five (5) days' notice thereof to the defendants, enter an order granting to the plaintiff title to the property, less and except all oil, gas and other minerals which may be produced through a well bore, and the right to immediate entry unless, for other cause shown or for uncertainty concerning the immediate public need for such property pursuant to Section 11-27-83, the judge shall determine that such passing of title, and right of entry should be denied. However, no person lawfully occupying real property shall be required to move from a dwelling or to move his business or farm operation without at least ninety (90) days' written notice prior to the date by which such move is required.

(2) Upon entry of said order, the plaintiff may deposit not less than eighty-five percent (85%) of the amount of the compensation and damages as determined by the appraiser with the clerk of the court, and upon so doing, the plaintiff shall be granted title to the property, less and except all oil, gas and other minerals which may be produced through a well bore, and shall have the right to immediate entry to said property. The defendant, or defendants, shall be entitled to receive the amount so paid to the clerk of the court, which shall be disbursed as their interest may appear, pursuant to order of the court.

(3) Notwithstanding any provisions of subsections (1) and (2) of this section to the contrary, title and immediate possession to real property, including oil, gas and other mineral interests, may be granted under this section to (a) any county authorized to exercise the power of eminent domain under Section 19-7-41 for the purpose of acquiring land for construction of a federal correctional facility or other federal penal institution, and (b) the Mississippi Major Economic Impact Authority for the purpose of acquiring land, property and rights-of-way for a project as defined in Section 57-75-5(f)(iv)1 and any facility related to such project.

SOURCES: Codes, 1942, § 2749-04.5; Laws, 1972, ch. 489, § 1; Laws, 1986, ch. 465, § 2; Laws, 1988, ch. 447, § 1; Laws, 1991, ch. 573, § 70; Laws, 1994, ch. 310, § 3; Laws, 2000, 3rd Ex Sess, ch. 1, § 12, eff from and after passage (approved Nov. 6, 2000.)

Cross References — Mississippi Superconducting Super Collider Authority's right to immediate possession of land, see § 57-67-11.

Application to provisions of Mississippi Wayport Authority-Act, see § 61-4-11.

Eminent domain proceedings, see Miss. R. Civ. P. 81.

JUDICIAL DECISIONS

1. In general.

The only purpose of the report of a court-appointed expert appraiser is to ascertain the value of the property to determine the amount of money that should be put on deposit with the clerk of the court pursuant to § 11-27-85. *Hudspeth v. State Hwy. Comm'n*, 534 So. 2d 210 (Miss. 1988).

Under the quick-take law (Code 1972, §§ 11-27-81 through 11-27-91), the defendants have the absolute right to withdraw

the funds deposited by the petitioner subject only to the order of the court as to their distribution, and the petitioner has no further control of the funds and no right to withdraw them after they are deposited; under these circumstances, the petitioner should not and is not required to pay interest on the amount deposited after the date of its deposit. *Mississippi State Hwy. Comm'n v. Owen*, 310 So. 2d 920 (Miss. 1975).

RESEARCH REFERENCES

ALR. Payment or deposit in court as affecting condemnor's right to appeal. 40 A.L.R.3d 203.

Am Jur. 9 Am. Jur. Pl & Pr Forms (Rev), Eminent Domain, Forms 80-85 (Order granting immediate possession).

§ 11-27-87. Effect of insufficiency or excess of deposit.

If the plaintiff takes title to and possession of the land condemned pursuant to the order of the court and the amount of compensation as determined upon final disposition of the case is in excess of the amount of the deposit, the plaintiff shall pay interest to the owner at the rate of eight percent (8%) per annum upon the amount of such excess from the date of the filing of the complaint until payment is actually made. If the plaintiff takes title to and possession of the land condemned pursuant to the order of the court and the amount of the compensation as determined upon final disposition of the case is less than the amount of the deposit, the plaintiff shall be entitled to a personal judgment against the owner for the amount of the difference.

SOURCES: Codes, 1972, § 2749-04.5; Laws, 1972, ch. 489, § 1; Laws, 1988, ch. 447, § 2; Laws, 1991, ch. 573, § 71, eff from and after July 1, 1991.

Cross References — Mississippi Superconducting Super Collider Authority's right to immediate possession of land, see § 57-67-11.

Application to provisions of Mississippi Wayport Authority Act, see § 61-4-11.

Eminent domain proceedings, see Miss. R. Civ. P. 81.

JUDICIAL DECISIONS

1. In general.

Under the quick-take law, the landowner is entitled to interest on the excess of the amount paid to the court at the rate of 8 per cent per annum from the date the petition was filed until the judgment is finally paid, and there was no merit in petitioner's contention that the landowner was only entitled to 6 per cent interest on

this amount for the reason that petitioner did not physically take possession of the property; the petitioner had the right of entry and possession, and what it did relative to taking actual physical possession of the property was entirely within its discretion. *Mississippi State Hwy. Comm'n v. Owen*, 310 So. 2d 920 (Miss. 1975).

§ 11-27-89. Compensation of appraiser; right to jury trial.

The appraiser shall receive as compensation for his services such sum, plus expenses, as the court allows, which shall be taxed as cost in the proceedings. The sum allowed shall be based upon the degree of difficulty and the time required to perform the appraisal, but may not exceed One Thousand Dollars (\$1,000.00) unless, in the opinion of the court, special circumstances warrant a greater sum. An order granting a sum greater than One Thousand Dollars (\$1,000.00) must describe in detail the special circumstances that warrant payment of a greater sum.

The making of a deposit by the plaintiff or the withdrawal of said deposit by the defendant or defendants shall not prejudice the right of any party to a trial by jury in the special court of eminent domain to determine the fair market value of the property to be condemned and the damages, if any, to the remainder if less than the whole is taken, as provided in Sections 11-27-1 through 11-27-49, Mississippi Code of 1972.

SOURCES: Codes, 1942, § 2749-04.5; Laws, 1972, ch. 489, § 1; Laws, 1991, ch. 573, § 72; Laws, 1993, ch. 361, § 1; Laws, 2000, ch. 451, § 1, eff from and after passage (approved Apr. 18, 2000.)

Cross References — Mississippi Superconducting Super Collider Authority's right to immediate possession of land, see § 57-67-11.

Application to provisions of Mississippi Wayport Authority Act, see § 61-4-11.

Eminent domain proceedings, see Miss. R. Civ. P. 81.

JUDICIAL DECISIONS

1. In general.

In a "quick take" eminent domain proceeding, the trial court acted properly in not allowing the landowner to call the court-appointed expert appraiser as a witness. *State Hwy. Comm'n v. Culpepper*,

536 So. 2d 18 (Miss. 1988).

The limiting amount of § 11-27-89 is for "services," not for "an appraisal." *State Hwy. Comm'n v. Rankin County Bd. of Educ.*, 531 So. 2d 612 (Miss. 1988).

§ 11-27-91. Special funds and accounts of highway commission.

The highway commission of the State of Mississippi is hereby authorized to set up and maintain such special funds and accounts as it may consider necessary and proper to make the deposits and pay the costs as authorized by Sections 11-27-81 through 11-27-89, and to pay such judgments as may be entered and such other costs as may be incidental to the acquisition of property for right-of-way purposes. Disbursement from such special funds shall be by check properly drawn against said fund signed by such personnel as may be duly authorized by the highway commission of the State of Mississippi.

SOURCES: Codes, 1942, § 2749-04.6; Laws, 1972, ch. 489, § 2, eff from and after passage (approved May 10, 1972).

Cross References — Eminent domain proceedings, see Miss. R. Civ. P. 81.

CHAPTER 29

Sequestration

SEC.

- 11-29-1. Issuance of writ of sequestration.
- 11-29-3. Affidavit required.
- 11-29-5. Security required.
- 11-29-7. Writ granted by chancellor or judge.
- 11-29-9. Contents of writ.
- 11-29-11. Complainant may bond the property in certain cases.
- 11-29-13. Disposal of property if not bonded.

§ 11-29-1. Issuance of writ of sequestration.

When a bill is filed in the chancery court in reference to personal property, and affidavit and bond as required therefor is made and filed, the clerk of the court shall issue a writ of sequestration.

SOURCES: Codes, 1880, § 1854; 1892, § 511; Laws, 1906, § 562; Hemingway's 1917, § 322; Laws, 1930, § 408; Laws, 1942, § 1328.

Cross References — Jurisdiction to grant remedial writs, see § 9-1-19.

Procedure for attachment of perishable commodities, see §§ 11-1-43 through 11-1-49.

Circuit court order to protect property in controversy, see § 11-7-169.

Writ to seize property in partition proceeding, see § 11-21-77.

Attachment in chancery against nonresident, absent or absconding debtors, see Chapter 31 of this title.

Attachment at law against debtors, see Chapter 33 of this title.

Seizure of person or property, see Miss. R. Civ. P. 64.

JUDICIAL DECISIONS

1. In general.

The state sequestration statutes, under which property could be impounded and put beyond use during the pendency of litigation on an alleged debt, all by a writ of sequestration issued by a court clerk without notice or opportunity for an early hearing and without participation by a judicial officer, violated due process both facially and as applied. *Keelon v. Davis*, 475 F. Supp. 204 (N.D. Miss. 1979).

Although there had been reasonable grounds upon which to seek the issuance of a writ of sequestration of defendant's funds and the writ was not wrongfully sued out in the first instance, the sequestration would be set aside where subsequent developments demonstrated that the funds had been wrongfully sequestered because of plaintiff's failure to sustain her cause of action in any material

respect. *Altherr v. Swiss Am. of Miss., Inc.*, 446 F. Supp. 17 (N.D. Miss. 1977).

Personal property in the state of a non-resident may be seized under an attachment in chancery to await final decree upon filing the required affidavit and bond. *Universal Credit Co. v. Linn Motor Co.*, 195 Miss. 565, 15 So. 2d 44 (1943).

Seizure of automobile under writ of sequestration issued after sequestration bond was duly furnished by complainant was void where no affidavit was filed showing that complainant had good reason to believe, and did believe, that there was danger of the removal of the property involved in the suit beyond the limits of the state or of its concealment in the state so as to be beyond the process of the court, or of its transfer so as to defeat the rights of complainant, and that such removal, concealment or transfer was about to oc-

cur. *Universal Credit Co. v. Linn Motor Co.*, 195 Miss. 565, 15 So. 2d 44 (1943).

Writ of sequestration can be issued only in pending case where complaint has been filed and is in reference to personal property; writ of sequestration issued prior to filing bill is irregular and should be

quashed on motion. *Yazoo Delta Mtg. Co. v. Hutson*, 140 Miss. 461, 106 So. 5 (1925).

Chancery court has jurisdiction of writ of sequestration for preservation of personal property independent of statute. *Dean v. Boyd*, 86 Miss. 204, 38 So. 297 (1905).

RESEARCH REFERENCES

Am Jur. 70 Am. Jur. 2d, Sequestration, § 33.

22 Am. Jur. Pl & Pr Forms (Rev), Sequestration, Form 8 (Writ of sequestration to preserve property pending litigation).

22 Am. Jur. Pl & Pr Forms (Rev), Sequestration, Form 26 (Writ of sequestration for failure to comply with court order.

Writ of sequestration, 18 Am. Jur. Pl & Pr Forms, Sequestration, Forms 421, 422. **CJS.** 79 C.J.S., Sequestration § 14.

Law Reviews. Symposium on Mississippi Rules of Civil Procedure: Provisional and Final Remedies and Special Proceedings — Rules 64-71. 52 Miss. L. J. 183, March 1982.

§ 11-29-3. Affidavit required.

Before any writ of sequestration shall issue, the complainant shall make and file an affidavit showing that he has good cause to believe, and does believe, that there is danger of the removal of the property involved in the suit beyond the limits of the state, or of its concealment in the state so as to be beyond the process of the court, or of its transfer so as to defeat the rights of the complainant, and that such removal, concealment, or transfer is about to occur, and, moreover, shall give the bond required by Section 11-29-5.

SOURCES: Codes, 1880, § 1854; 1892, § 512; Laws, 1906, § 563; Hemingway's 1917, § 323; Laws, 1930, § 409; Laws, 1942, § 1329.

Cross References — Affidavit required for attachments against debtors, see § 11-33-9.

Seizure of person or property, see Miss. R. Civ. P. 64.

JUDICIAL DECISIONS

1. In general.

Personal property in the state of a non-resident may be seized under an attachment in chancery to await final decree upon filing the required affidavit and bond. *Universal Credit Co. v. Linn Motor Co.*, 195 Miss. 565, 15 So. 2d 44 (1943).

Seizure of automobile of nonresident under writ of sequestration was void, and court had no jurisdiction to order a sale of trust property, where no affidavit was filed as required by this section [Code 1942, § 1329]. *Universal Credit Co. v. Linn Motor Co.*, 195 Miss. 565, 15 So. 2d 44 (1943).

The personal property of a non-resident defendant can be seized under an attachment in chancery to await final decree only upon affidavit and bond as required by this section [Code 1942, § 1329] regulating the writ of sequestration. *Advance Lumber Co. v. Laurel Nat'l Bank*, 86 Miss. 419, 38 So. 313 (1905).

Decree refusing to dismiss sequestration proceedings will not be reversed because of error in not requiring affidavit to be amended so as to conform literally with statute. *Dean v. Boyd*, 86 Miss. 204, 38 So. 297 (1905).

RESEARCH REFERENCES

Am Jur. 70 Am. Jur. 2d, Sequestration, §§ 38, 39.

CJS. 79 C.J.S., Sequestration §§ 9-13.

Law Reviews. Symposium on Missis-

sippi Rules of Civil Procedure: Provisional and Final Remedies and Special Proceedings — Rules 64-71. 52 Miss. L. J. 183, March 1982.

§ 11-29-5. Security required.

Before the writ of sequestration shall issue in any case, the complainant shall enter into bond with sufficient sureties, payable to the defendant, in double the value of the property proposed to be seized, to be fixed by the clerk from affidavit, or such evidence as may satisfy him, conditioned to pay all damages which may accrue from the wrongful seizure of the property to be sequestered, which bond shall be filed in the cause.

SOURCES: Codes, 1880, § 1854; 1892, § 513; Laws, 1906, § 564; Hemingway's 1917, § 325; Laws, 1930, § 410; Laws, 1942, § 1330.

Cross References — Bond required in attachments against debtors, see §§ 11-33-11 through 11-33-15.

Bond required for seizure of perishable commodities, see § 11-1-43.

Seizure of person or property, see Miss. R. Civ. P. 64.

JUDICIAL DECISIONS

1. In general.

Where mule was sequestered sureties on bond not liable when mule died before final decree. *Gaddis v. Clegg*, 118 Miss. 607, 79 So. 811 (1918).

The personal property of a nonresident defendant can be seized under an attachment in chancery to await final decree only upon affidavit and bond as required

by this section [Code 1942, § 1330]. *Advance Lumber Co. v. Laurel Nat'l Bank*, 86 Miss. 419, 38 So. 313 (1905).

The bond secures damages resulting from the wrongful seizure of the property, but not attorney's fees and other expenses incident to the case in which the writ is obtained. *Stauffer v. Garrison*, 61 Miss. 67 (1883).

RESEARCH REFERENCES

Am Jur. 70 Am. Jur. 2d, Sequestration §§ 40, 64, 65.

22 Am. Jur. Pl & Pr Forms (Rev), Sequestration, Form 5 (Bond by plaintiff to sequester personal property during pendency of action).

CJS. 79 C.J.S., Sequestration §§ 9-13.

Law Reviews. Symposium on Mississippi Rules of Civil Procedure: Provisional and Final Remedies and Special Proceedings — Rules 64-71. 52 Miss. L. J. 183, March 1982.

§ 11-29-7. Writ granted by chancellor or judge.

Writs of sequestration may also be ordered, and the amount of the bond to be given therefor by complainant may be prescribed, by the chancellor or by any judge authorized to grant remedial process of such nature.

SOURCES: Codes, 1880, § 1854; 1892, § 517; Laws, 1906, § 568; Hemingway's 1917, § 328; Laws, 1930, § 411; Laws, 1942, § 1331.

Cross References — Jurisdiction to grant writ of sequestration, see § 9-1-19.
Seizure of person or property, see Miss. R. Civ. P. 64.

RESEARCH REFERENCES

Am Jur. 70 Am. Jur. 2d, Sequestration § 33.

22 Am. Jur. Pl & Pr Forms (Rev), Sequestration, Form 8 (Writ of sequestration to preserve property pending litigation).

22 Am. Jur. Pl & Pr Forms (Rev), Sequestration, Form 26 (Writ of sequestration for failure to comply with court order).

CJS. 79 C.J.S., Sequestration § 14.

Law Reviews. Symposium on Mississippi Rules of Civil Procedure: Provisional and Final Remedies and Special Proceedings — Rules 64-71. 52 Miss. L. J. 183, March 1982.

§ 11-29-9. Contents of writ.

The writ of sequestration shall be directed to the sheriff or other proper officer commanding him to seize and take into possession the property in question and to hold the same until the further order of the court or chancellor, or until the defendant from whose possession the same was taken shall enter into bond with sufficient sureties, payable to the complainant in double the value of the property, to be assessed by the officer, conditioned to have the property forthcoming to abide the decree to be made by the court in the cause, or until the said defendant shall enter into bond with sufficient sureties, to be approved by the officer, payable to the complainant, in double the amount of the indebtedness claimed, conditioned for the performance of such final decree as may be entered in the cause. If a forthcoming bond be given, it shall be returned with the writ and filed in the cause, and, in case the property shall not be delivered or forthcoming to abide the decree, the bond shall have the force and effect of a judgment; and execution may issue thereon against all the obligors for the amount of the decree or the value of the property, according to the nature of the case. If a bond in double the debt be given, it shall be returned and filed with the papers in the cause. A bond in double the value of the property shall always be required, except when its value shall greatly exceed the debt and all probable costs.

SOURCES: Codes, 1880, § 1854; 1892, § 514; Laws, 1906, § 565; Hemingway's 1917, § 324; Laws, 1930, § 412; Laws, 1942, § 1332.

Cross References — Writ of sequestration dealing with perishable commodities, see § 11-1-43.

Writ of sequestration in proceedings to partition personal property, see § 11-21-71.
Seizure of person or property, see Miss. R. Civ. P. 64.

JUDICIAL DECISIONS

1. In general.

Independently of statute, a court of equity has jurisdiction to issue writ of seizure and preserve personal property

awaiting final decree. *Lee v. Lee*, 135 Miss. 865, 101 So. 345 (1924).

Sequestration bond is separate and distinct from injunction bond. *Harleston v.*

West La. Bank, 126 Miss. 593, 89 So. 257 (1921).

Sequestration bond may be required to be made in Supreme Court. Harleston v. West La. Bank, 126 Miss. 593, 89 So. 257 (1921).

In suit by tenants to cancel deed absolute in form on theory that it was a mortgage, on cross-bill of defendant landlord it is within the discretion of the chancellor to issue writ of sequestration to seize sufficient crops to cover rents upon proper bond to indemnify complainants. McGehee v. Weeks, 112 Miss. 483, 73 So. 287 (1916).

Where property was sequestered, defen-

dant's forthcoming bond was governed by this section [Code 1942, § 1332] and court could not give decree thereon for wrongful detention. Bomer v. Meeks, 106 Miss. 870, 64 So. 833 (1914).

Forthcoming bond need be only double the debt where the value of the property greatly exceeds the debt, but where debt equals or exceeds the value of the property bond must be double value or property. Bomer v. Meeks, 106 Miss. 870, 64 So. 833 (1914).

Sequestration bond with only one surety may be amended so as to comply with law. Dean v. Boyd, 86 Miss. 204, 38 So. 297 (1905).

RESEARCH REFERENCES

Am Jur. 70 Am. Jur. 2d, Sequestration § 43.

22 Am. Jur. Pl & Pr Forms (Rev), Sequestration, Form 34 (Bond by defendant to retain possession of sequestered property).

CJS. 79 C.J.S., Sequestration § 12.

Law Reviews. Symposium on Mississippi Rules of Civil Procedure: Provisional and Final Remedies and Special Proceedings — Rules 64-71. 52 Miss. L. J. 183, March 1982.

§ 11-29-11. Complainant may bond the property in certain cases.

Should the defendant fail to give bond as above allowed, within five days from the date of seizure, then the complainant at whose instance the property was seized may give such bond and receive the property. In such case, the bond shall be dealt with in all respects as if the defendant had given it and retained the property.

SOURCES: Codes, 1880, § 1854; 1892, § 515; Laws, 1906, § 566; Hemingway's 1917, § 326; Laws, 1930, § 413; Laws, 1942, § 1333.

Cross References — Seizure of person or property, see Miss. R. Civ. P. 64.

JUDICIAL DECISIONS

1. In general.

In suit by tenants to cancel deed absolute in form on theory that it was a mortgage, on cross-bill by defendant landlord it is within the discretion of the chancellor

to issue writ of sequestration to seize sufficient crops to cover rents upon proper bond to indemnify complainants. McGehee v. Weeks, 112 Miss. 483, 73 So. 287 (1916).

RESEARCH REFERENCES

Am Jur. 70 Am. Jur. 2d, Sequestration, § 42.

22 Am. Jur. Pl & Pr Forms (Rev), Sequestration, Form 33 (Bond by plaintiff to

indemnify sequestering officer).

CJS. 79 C.J.S., Sequestration §§ 20-29.

Law Reviews. Symposium on Mississippi Rules of Civil Procedure: Provisional

and Final Remedies and Special Proceedings — Rules 64-71. 52 Miss. L. J. 183, March 1982.

§ 11-29-13. Disposal of property if not bonded.

If neither of the parties litigant shall give such bond as allowed within ten days after the seizure, the officer having possession of the property shall sell the same, in the mode prescribed by law for selling property levied upon under writs of fieri facias, if the property be liable to waste or decay, or if subject to extraordinary expense in preserving the same, and hold the proceeds subject to the future orders of the court. If the property be not liable to waste or decay, or be not expensive to keep, it shall be held by such officer, unless the court or the chancellor shall order it to be sold, as may be done when it is thought best to do so. If such property shall be sold, either by the officer seizing it, in the state of case provided for when he may sell it, or by order of the court or chancellor, the proceeds of such sale shall be subject to the orders of the court or chancellor, as to their safe keeping or investment, during the litigation. If the property seized be liable to immediate waste or decay, it shall be sold immediately. If the defendant do not give bond to retain the property within five days from its seizure, and the complainant do not do so within five days after defendant's failure, either party may, before sale of the property, give the required bond and receive the property, or after sale may give such bond and receive the proceeds.

SOURCES: Codes, 1880, § 1854; 1892, § 516; Laws, 1906, § 567; Hemingway's 1917, § 327; Laws, 1930, § 414; Laws, 1942, § 1334.

Cross References — Sale of property under attachment, see §§ 11-33-71 and 11-33-73.

Seizure of person or property, see Miss. R. Civ. P. 64.

JUDICIAL DECISIONS

1. In general.

Where in suit to enforce a mechanic's lien for labor done on a wrecked automobile, the bill of complaint alleged that credit company claimed some interest in such automobile, and such credit company was served with process by publication and decree pro confesso was taken against such company upon its failure to appear, and on appeal credit company was permitted to file forthcoming bond, appeal could not be defeated on ground that credit company was not a party to the suit. *Universal Credit Co. v. Linn Motor Co.*, 195 Miss. 565, 15 So. 2d 44 (1943).

Where automobile seized under writ of sequestration in an attachment in chan-

cery was ordered sold for the payment of complainant's mechanic lien thereon, and neither party had given bond therefor, defendant on appeal before sale was entitled to give forthcoming bond in amount sufficient to protect the rights of all the parties and to receive automobile from sheriff pending final determination of cause. *Universal Credit Co. v. Linn Motor Co.*, 195 Miss. 565, 15 So. 2d 44 (1943).

The independent and illegal act of the sheriff in selling property not subject to waste or decay is not cause for reversal of the decree of the court. *Day v. Hartman*, 74 Miss. 489, 21 So. 302 (1897).

RESEARCH REFERENCES

Am Jur. 70 Am. Jur. 2d, Sequestration, §§ 46, 47, 51.

CJS. 50 C.J.S., Judicial Sales §§ 15-30.

Law Reviews. Symposium on Missis-

sippi Rules of Civil Procedure: Provisional and Final Remedies and Special Proceedings — Rules 64-71. 52 Miss. L. J. 183, March 1982.

CHAPTER 31

Attachment in Chancery Against Nonresident, Absent or Absconding Debtors

SEC.

- 11-31-1. Jurisdiction; debtors.
- 11-31-2. Application for order of attachment; determination.
- 11-31-3. Attaching property or indebtedness.
- 11-31-5. Levy on land.
- 11-31-7. Writs of sequestration for personal property.
- 11-31-9. Publication for appearance of defendant.
- 11-31-11. Complainant to give security after decree rendered.

§ 11-31-1. Jurisdiction; debtors.

The chancery court shall have jurisdiction of attachment suits based upon demands founded upon any indebtedness, whether the same be legal or equitable, or for the recovery of damages for the breach of any contract, express or implied, or arising ex delicto against any nonresident, absent or absconding debtor, who has lands and tenements within this state, or against any such debtor and persons in this state who have in their hands effects of, or are indebted to, such nonresident, absent or absconding debtor. The court shall give a decree in personam against such nonresident, absent or absconding debtor if summons has been personally served upon him, or if he has entered an appearance.

SOURCES: Codes, 1880, § 1832; 1892, § 486; Laws, 1906, § 536; Hemingway's 1917, § 293; Laws, 1930, § 173; Laws, 1942, § 2729.

Cross References → Cases in which attachment is a remedy, see § 11-33-1.

Disposal of exempt property, see § 85-3-49.

Seizure of person or property, see Miss. R. Civ. P. 64.

JUDICIAL DECISIONS

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| 1. Validity. | 16. Res judicata. |
| 2. Construction and application generally. | 17. Auxiliary relief. |
| 3. Jurisdiction. | 18. —Injunction. |
| 4. —Special appearance. | 19. —Receiver, appointment of. |
| 5. Demands on which attachment may be founded. | 20. Damages. |
| 6. Property subject to attachment. | 21. —Attorney fees, allowance of. |
| 7. Persons entitled to sue. | |
| 8. Nonresidents. | |
| 9. Persons subject to attachment. | |
| 10. Procedure. | |
| 11. Pleading. | |
| 12. Parties. | |
| 13. Judgment. | |
| 14. —Pro confesso decree. | |
| 15. —Personal decrees. | |

1. Validity.

Mississippi Attachment Statute (§§ 11-31-1 et seq.) is not unconstitutional notwithstanding defendant's contentions that (1) it fails to require nexus between property attached and underlying claim, (2) it does not provide for pre-seizure notice or pre-seizure hearing, (3) it prohibits defendant from making limited appearance to defend his claim to property

attached, (4) its bond requirements are unfair and discriminatory as to attached defendant, and (5) it is silent as to future accruing debts. *Estate of Portnoy v. Cessna Aircraft Co.*, 603 F. Supp. 285 (S.D. Miss. 1985).

The statutory procedure for the attachment of realty, under which attachment could be invoked without any showing of a particularized need, so long as defendant debtor was a nonresident, was violative of due process both facially and as applied to the breach of contract action at issue. *MPI, Inc. v. McCullough*, 463 F. Supp. 887 (N.D. Miss. 1978).

The statutory provisions allowing for attachment in chancery against nonresident, absent or absconding debtors were unconstitutional on their face and as applied where, inter alia, they did not require the plaintiff to obtain any court ordered writ of sequestration or garnishment, where no bond was required of the plaintiff, where there was no judicial review of the validity of the attachment, either before or after service upon the attachment defendant, and where only by prevailing at trial on the merits could the principal defendant obtain relief from the attached indebtedness; as a matter of fairness and justice, sums owed to the principal defendant by nonresident attachment defendants arising out of transactions having no connection with Mississippi would be excluded from garnishment. *Mississippi Chem. Corp. v. Chemical Constr. Corp.*, 444 F. Supp. 925 (S.D. Miss. 1977).

Statute authorizing attachment suit against nonresident railroad doing business in county where necessary defendant may be found but where nonresident has no line of railroad or agent held not to deprive nonresident of equal protection of law. *Clark v. Louisville & N.R. Co.*, 158 Miss. 287, 130 So. 302 (1930).

Attachment suit against nonresidents brought in county of any necessary defendants as authorized by statute does not unconstitutionally discriminate against any necessary defendant. *Clark v. Louisville & N.R. Co.*, 158 Miss. 287, 130 So. 302 (1930).

Attachment proceeding against nonresident interstate railroad in which traffic

balances due defendant from other interstate railroads were impounded held not unlawful burden on interstate commerce. *Clark v. Louisville & N.R. Co.*, 158 Miss. 287, 130 So. 302 (1930).

2. Construction and application generally.

In an action against an out-of-state university, where the university engaged in a wide variety of educational functions in the recruitment and education of students from Mississippi, encouraged alumni activities in Mississippi, including the solicitation and acceptance of funds from alumni and friends in the state, and participated in a variety of intercollegiate competitions and activities with private and public institutions in Mississippi, such activities were sufficient under § 11-31-1 to render it constitutionally amenable to an adjudication of its rights in funds held by a clerk of the Chancery court. *Administrators of Tulane Educ. Fund v. Cooley*, 462 So. 2d 696 (Miss. 1984), cert. denied, 474 U.S. 820, 106 S. Ct. 70, 88 L. Ed. 2d 57 (1985).

In action by Kansas resident against defendant drug company, a Delaware corporation, for damages resulting from the use of birth control pills manufactured by defendant and sold in Kansas, plaintiff could properly attach under Code 1942, § 2729, moneys owed by 3 drug wholesale firms indebted to the defendant who did business in Mississippi, notwithstanding that the defendant owned no property in Mississippi and was not licensed to do business in Mississippi. *Steele v. G.D. Searle & Co.*, 483 F.2d 339 (5th Cir. 1973), reh'g denied, 485 F.2d 688 (5th Cir. 1973), cert. denied, 415 U.S. 958, 94 S. Ct. 1486, 39 L. Ed. 2d 572 (1974), on remand, 422 F. Supp. 560 (S.D. Miss. 1976).

An action on a contract against a nonresident defendant initiated by attachment in chancery under the provisions of this section [Code 1942, § 2729] is not an action in rem, but one in personam. *Hyde Constr. Co. v. Koehring Co.*, 388 F.2d 501 (10th Cir. Okla. 1968), cert. denied, 391 U.S. 905, 88 S. Ct. 1654, 20 L. Ed. 2d 419 (1968).

In the absence of any allegation in the bill of complaint or of proof to sustain an attachment in chancery, a real estate bro-

ker's suit for a commission allegedly earned by him should have been dismissed; however, the Supreme Court may not reverse because of error or mistake as to whether a cause is of equity or common law jurisdiction. *Minter v. Hart*, 208 So. 2d 169 (Miss. 1968).

The status quo of an attachment in chancery is not preserved by statute while the appeal is pending, as attachments in the Circuit Court are preserved by Code 1942, § 2724; and where a second nonresident attachment proceeding was brought against the same property after the first action had been appealed, the dubious effectiveness of the original attachment and *lis pendens* after an appeal had been taken without supersedeas, and because new issues had arisen which required the joinder of additional parties defendant, the second attachment should not have been quashed on the ground of a prior pending action. *General Acceptance Corp. v. Holbrook*, 189 So. 2d 923 (Miss. 1966).

Attachments in chancery in Mississippi are unique proceedings in the field of attachment law in the sense that the service of the attachment defendant does not bring any fund into the possession, custody, or control of the court, no moneys are paid into the registry of the court, and no bond is required. *Dunn v. Stewart*, 235 F. Supp. 955 (S.D. Miss. 1964), *rev'd*, 363 F.2d 591 (5th Cir. 1966).

Garnishment will not lie against the attachment defendant at the initiation of the action. *Dunn v. Stewart*, 235 F. Supp. 955 (S.D. Miss. 1964), *rev'd*, 363 F.2d 591 (5th Cir. 1966).

The attachment of the property of a nonresident creates a lien which attaches when the writ is served. *Associates Dist. Corp. v. Clark*, 240 Miss. 723, 128 So. 2d 535 (1961).

An attachment in chancery is primarily a proceeding in rem. *Mid-South Paving Co. v. Trinidad Asphalt Mfg. Co.*, 197 Miss. 751, 21 So. 2d 646 (1945), *error overruled*, 197 Miss. 751, 22 So. 2d 497 (1945).

That Code commissioners took statute providing for attachments in chancery out of chancery court chapter and placed it in chapter on attachment neither added to nor took anything away from statute. *Craig v. Gaddis*, 171 Miss. 379, 157 So. 684, 95 A.L.R. 1494 (1934).

Garnishment statutes held inapplicable to attachments in chancery, wherein pleadings, practice, and procedure are that of chancery court except where otherwise provided by statutes. *Craig v. Gaddis*, 171 Miss. 379, 157 So. 684, 95 A.L.R. 1494 (1934).

Attachment statutes held inapplicable to attachments in chancery, wherein pleadings, practice, and procedure are that of chancery court except where otherwise provided by statutes. *Craig v. Gaddis*, 171 Miss. 379, 157 So. 684, 95 A.L.R. 1494 (1934).

Neither statute preventing for 96 hours remission of proceeds of draft, nor attachment suit, changed the relationship of debtor and creditor and converted collecting bank into trustee for forwarding bank or latter's principal. *Love v. Fulton Iron Works*, 162 Miss. 890, 140 So. 528 (1932).

3. Jurisdiction.

Where the bill of complaint in a suit for attachment and garnishment alleged that the debtor owed the complainant for certain building material found to be in the possession of the defendant in Mississippi, and the defendant filed an answer in which he admitted that he had certain effects belonging to the debtor, the jurisdiction of the chancery court was established. *Crescent Plywood Co. v. Lawrence*, 305 So. 2d 343 (Miss. 1974).

An attachment is not invalid because the complainant's motion for leave to amend and ask for an attachment was not sworn to, where the jurisdictional facts contributing grounds for attachment had been stated in the complaint. *Illinois Cent. R.R. v. McDaniel*, 246 Miss. 600, 151 So. 2d 805 (1963).

In an attachment suit brought in a chancery court by an Alabama citizen to recover damages from an Alabama corporation for personal injuries received as a result of a railroad crossing accident in Alabama, and to attach funds or property in the hands of a Mississippi corporation, where the plaintiff did not get process by publication of summons on the nonresident defendant as required by Code 1942, § 2733, but relied solely on the attempted personal service executed on an employee, who was not such an agent of defendant upon whom process could be served, the

chancellor committed reversible error in overruling defendant's motion to dismiss for want of jurisdiction, even though the Mississippi corporation had answered admitting an indebtedness due to the defendant. *Alabama, Tenn. & N.R. Co. v. Howell*, 244 Miss. 157, 141 So. 2d 242 (1962).

Jurisdiction of an action against a non-resident unincorporated labor union may be obtained by an attachment of its personal property within the state. *Lowery v. International Bhd. of Boilermakers, Iron Ship Bldrs. & Helpers*, 241 Miss. 458, 130 So. 2d 831 (1961).

Where an attachment suit was filed in chancery against a resident defendant and a nonresident defendant to subject funds that were in the hands of resident defendant, to determine which of the two defendants was liable to the complainants for labor performed on resident defendant's leased premises, and where also a bill of discovery was filed as to what funds resident defendant had in his hands belonging to the nonresident defendant, there was sufficient to confer jurisdiction on chancery court. *Taylor v. Hines*, 221 Miss. 759, 74 So. 2d 834 (1954).

Neither a special nor a general appearance by a defendant admits the jurisdiction of the court. *Martin v. Adams Mercantile Co.*, 203 Miss. 177, 33 So. 2d 633 (1948).

Jurisdiction in attachment suits is lacking where the defendant does not own the land upon which the attachment is levied. *Martin v. Adams Mercantile Co.*, 203 Miss. 177, 33 So. 2d 633 (1948).

Attachment proceedings cannot be sustained where nonresident debtor has no lands in this state and no effects in the hands of some resident third person, and where no resident third person is alleged to be indebted to him, although he may have personalty in this state. *Universal Credit Co. v. Linn Motor Co.*, 195 Miss. 565, 15 So. 2d 44 (1943).

Attachment will not lie to reach the interest of nonresident partners in a partnership bank deposit, where to do so it would be necessary for the court to wind up the partnership and distribute its assets in order to ascertain the interest of such nonresident partners. *S. & W.*

Constr. Co. v. Wood, 194 Miss. 831, 13 So. 2d 625 (1943).

Lower court properly overruled motion to dismiss bill of complaint upon quashing of attachment against partnership, consisting of one resident and two nonresident members, since complainant's claim for damages remains for trial against two members of the partnership on whom process was served. *S. & W. Constr. Co. v. Wood*, 194 Miss. 831, 13 So. 2d 625 (1943).

Equity jurisdiction by attachment under this section [Code 1942, § 2729] can be raised by motion separately filed. *Ford v. Mutual Life Ins. Co.*, 194 Miss. 519, 13 So. 2d 45 (1943).

In order to sustain an attachment in chancery against a nonresident, there must be a debt owing from the nonresident, and there must be effects in the hands of the resident defendants, or land must be attached in the manner provided by the statute to give the court jurisdiction. *York v. York*, 187 Miss. 465, 193 So. 330 (1940).

Words "persons in this State" mean persons residing in this State, and process on nonresidents temporarily residing in State does not give court jurisdiction over them. *Alabama Power Co. v. Jackson*, 181 Miss. 691, 179 So. 571 (1938).

Service of process in another county upon corporation domesticated in State did not give court jurisdiction over it in absence of process on defendant residing in county. *Alabama Power Co. v. Jackson*, 181 Miss. 691, 179 So. 571 (1938).

Chancery court held to have jurisdiction of foreign attachment to recover unliquidated claim for alimony from executors of estate of deceased father of principal defendant under statute providing that chancery court shall have jurisdiction of attachment suits for breach of contract, express or implied, against persons in Mississippi having in their hands effects of, or indebted to, an absent or absconding debtor. *Kearney v. Kearney*, 178 Miss. 766, 174 So. 59 (1937).

Circuit court held vested with jurisdiction of action transferred by chancery court, whether action was one of law cognizance or not. *Dunn v. Dent*, 176 Miss. 786, 170 So. 299 (1936).

Chancery court of county in which attachment suit was filed against domestic

bank, which bill alleged was domiciled in another county, and foreign bank, to which garnished domestic corporation, domiciled in another county, was alleged to be indebted, to recover amount of check on ground of banks' negligence in collection thereof, had no territorial jurisdiction of domestic bank, between which and garnishee there was neither privity nor connection. *Estes v. Bank of Walnut Grove*, 172 Miss. 499, 159 So. 104 (1935).

Court, by personal service on agent of garnishee, foreign corporation, found doing business in State, and therefore subject to suit by nonresident employee, creditor, acquired jurisdiction over garnishee to require answer and to condemn any indebtedness due from it to employee-creditor under employment contract made and performable outside State. *Bean v. Bean*, 166 Miss. 434, 147 So. 306 (1933).

Chancery court acquired jurisdiction of attachment suit where defendant did not plead specially to court's jurisdiction but defended generally. *Mobile & O.R. Co. v. Swain*, 164 Miss. 825, 145 So. 627 (1933).

Chancery court has jurisdiction to subject property in hands of resident defendant to obligation of non-resident in favor of creditor; exercise of statutory jurisdiction to subject property in hands of resident defendant to obligation of non-resident is not one of original jurisdiction. *Boyett v. Boyett*, 152 Miss. 201, 119 So. 299 (1928).

Chancery court cannot try claimant's issue against non-resident claimant who does not voluntarily enter his appearance or who has not been personally served with process. *Delta Ins. & Realty Agency v. Fourth Nat'l Bank*, 137 Miss. 855, 102 So. 846 (1925).

Chancery court on a bill against a non-resident partner to enforce his individual liability for a debt, had jurisdiction to issue an attachment against his individual real estate in Mississippi. *Dinwiddie v. Glass*, 111 Miss. 449, 71 So. 745 (1916).

If the garnishee be personally served with process in this state the court acquires jurisdiction over him and can garnish the debt due the debtor of plaintiff and condemn it, provided the garnishee could himself be sued by his creditors in this state, regardless of the original situs

of the debt outside the state. *Southern Pac. R.R. v. A.J. Lyon & Co.*, 99 Miss. 186, 54 So. 728, *Am. Ann. Cas.* 1913D,800 (1911), error overruled, 54 So. 784 (Miss. 1911).

Chancery court has no jurisdiction of an attachment against a non-resident debtor unless the land or tenements of the non-resident be levied upon or the resident defendant be indebted to or have effects of the non-resident in his hands or possession. *Louis Werner Sawmill Co. v. Sheffield*, 89 Miss. 12, 42 So. 876 (1907).

The court under this section [Code 1942, § 2729] has no jurisdiction of an attachment of a nonresident debtor who has no lands in this state and no effects in the hands of some resident although he have personalty in this state. *Advance Lumber Co. v. Laurel Nat'l Bank*, 86 Miss. 419, 38 So. 313 (1905).

Independently of statute, by virtue of its general equity powers, the court may, without a judgment at law and nulla bona return, subject to the demand of creditors the effects in this state of a non-resident. *Dollman v. Moore*, 70 Miss. 267, 12 So. 23 (1892).

The basis of the chancery jurisdiction is statutory. Complainant need not show equity independent of the statute. *Scruggs v. Blair*, 44 Miss. 406 (1870); *Statham v. New York Life Ins. Co.*, 45 Miss. 581 (1871); *T.H. & J.M. Allen & Co. v. Montgomery*, 48 Miss. 101 (1873).

4. —Special appearance.

Special appearance by a foreign domesticated insurance company, challenging the jurisdiction of the court, resulting in a quashing of the attachment, did not authorize the chancellor to dismiss the bill where personal process had been had on the insurance company by service upon the state insurance commissioner. *Ford v. Mutual Life Ins. Co.*, 194 Miss. 519, 13 So. 2d 45 (1943).

Nonresident debtor in attachment suit, appearing solely for purpose of objecting, did not, thereby, submit to jurisdiction of court. *Alabama Power Co. v. Jackson*, 181 Miss. 691, 179 So. 571 (1938).

Defendant's appearance especially for purpose of moving to quash attachment and dismiss bill for want of jurisdiction cannot operate as personal appearance.

First Nat'l Bank v. Mississippi Cottonseed Prods. Co., 171 Miss. 282, 157 So. 349 (1934).

5. Demands on which attachment may be founded.

In an action against a sheriff and his surety based on the sheriff's alleged tort, it is not necessary that the sheriff's liability be determined and fixed by decree or judgment before an attachment will lie against the nonresident surety. *Holyfield v. State*, 194 Miss. 91, 10 So. 2d 841 (1942).

Where the codicil to a former will transformed the debt of a beneficiary under such will into an advancement, and such codicil was signed by the beneficiary, a subsequent will directing the executors to collect the sum in question as a debt did not operate, without the consent of the beneficiary concerned, to recreate it as a debt on which an attachment in chancery could be founded. *York v. York*, 187 Miss. 465, 193 So. 330 (1940).

Statutory penalties for violating anti-trust law held "indebtedness" within attachments statute. *Aetna Ins. Co. v. Robertson*, 126 Miss. 387, 88 So. 883 (1921).

A bill is maintainable against a nonresident having property in this state to redress a wrong, even if the damages are unliquidated. *Gordon v. Warfield*, 74 Miss. 553, 21 So. 151 (1897); *Illinois Cent. R.R. v. Lucas*, 89 Miss. 411, 42 So. 607 (1906).

A demand for rents by an infant or insane person against a disseizor can be maintained by an attachment in chancery. *Robinson v. Burritt*, 66 Miss. 356, 6 So. 206 (1889).

The complainant need not have a judgment at law. *Comstock v. Rayford*, 9 Miss. (1 S. & M.) 423 (1843); *Zecharie v. Bowers*, 11 Miss. (3 S. & M.) 641 (1844).

6. Property subject to attachment.

The automobile of a nonresident may be attached in an action for damages caused by a collision in which it was involved. *Associates Disct. Corp. v. Clark*, 240 Miss. 723, 128 So. 2d 535 (1961).

In a suit by attachment in chancery against nonresidents, the seizure of their community automobile gave the plaintiff a lien upon it to satisfy his recovery, and there was no error in subjecting the pro-

ceeds from the agreed sale of the car to the satisfaction of plaintiff's recovery. *Vining v. Smith*, 213 Miss. 850, 58 So. 2d 34 (1952).

Land within the state sold by a nonresident defendant is subject to levy if the deed to purchaser has not been filed of record prior to the levy. *Martin v. Adams Mercantile Co.*, 203 Miss. 177, 33 So. 2d 633 (1948).

Funds of nonresident prime contractor to become due under contract with the State Highway Commission, which, prior to service of attachment process, in good faith and for purpose of financing performance of the prime contract, had been assigned as security for advances therein, do not constitute such effects of prime contractor as may be reached by attachment process in chancery until they have been or should have been released by the lender to the prime contractor. *Mid-South Paving Co. v. Trinidad Asphalt Mfg. Co.*, 197 Miss. 751, 21 So. 2d 646 (1945), error overruled, 197 Miss. 751, 22 So. 2d 497 (1945).

Percentages retained by the State Highway Commission under the prime contract are not such "effects" of the nonresident contractor as may be reached by process of attachment in chancery, where so retained under the contract in good faith. *Mid-South Paving Co. v. Trinidad Asphalt Mfg. Co.*, 197 Miss. 751, 21 So. 2d 646 (1945), error overruled, 197 Miss. 751, 22 So. 2d 497 (1945).

An attachment will not lie under this section [Code 1942, § 2729] to reach the interests of nonresident members of a partnership in a partnership bank deposit, where the effect of the attachment would be to withdraw from a resident partner the use and control of his interest in the deposit. *S. & W. Constr. Co. v. Wood*, 194 Miss. 831, 13 So. 2d 625 (1943).

Indebtedness of an insured to a life insurance company by virtue of a loan on the policy is not an indebtedness subject to attachment within the purview of this section. *Ford v. Mutual Life Ins. Co.*, 194 Miss. 519, 13 So. 2d 45 (1943).

Under contract whereby nonresident mill company was to deliver flour to resident purchaser when purchaser paid draft for purchase price and where payment of

draft and passing of title to flour took place simultaneously, "indebtedness" held not to exist from purchaser to mill company which could be reached by claimant for damages against mill company by foreign attachment in chancery. *Craig v. Gaddis*, 171 Miss. 379, 157 So. 684, 95 A.L.R. 1494 (1934).

Existing indebtedness only can be subjected to attachment, but unliquidated damages cannot be so reached. *Craig v. Gaddis*, 171 Miss. 379, 157 So. 684, 95 A.L.R. 1494 (1934).

Funds of non-resident corporations violating anti-trust law are subject to attachment in hands of resident agent, such agent not being entitled to retain the funds of the principal as against the state. *Nugent & Pullen v. Robertson*, 126 Miss. 419, 88 So. 895 (1921).

What "effects" bound in hands of resident defendants stated. *Aetna Ins. Co. v. Robertson*, 126 Miss. 387, 88 So. 883 (1921).

The personal property of a non-resident defendant can be seized under an attachment in chancery to await final decree only upon affidavit and bond as required by Code 1892 §§ 512 and 513 regulating the right of sequestration. *Advance Lumber Co. v. Laurel Nat'l Bank*, 86 Miss. 419, 38 So. 313 (1905).

The proceeds of such a draft are liable to the consignee for damages resulting from shortage in weight and defective quality of the particular goods represented by the bill of lading, but not for the failure of the consignor to deliver other goods, although they may be included in the one contract of sale. *Exchange Nat'l Bank v. Russell*, 81 Miss. 169, 32 So. 314 (1902).

Where a resident consignee attaches the proceeds of a draft paid by him in the hands of a resident state bank for damages arising out of the consignor's breach of contract, and makes a non-resident national bank, which had bought the draft for the price of the grain consigned, with a bill of lading attached, a defendant, there is no attachment against the national bank within § 5242 Rev. Stat. U. S. 1878, prohibiting an attachment against a national bank or its property. *Russel v. Smith Grain Co.*, 80 Miss. 688, 32 So. 287 (1902).

An attachment under this section [Code 1942, § 2729] cannot be maintained if the only property of the non-resident in this state be an unliquidated demand for damages because of a tort committed by a resident defendant. *Blair v. Kansas City, M. & B.R. Co.*, 76 Miss. 478, 24 So. 879 (1899).

An unliquidated liability for damages because of a tort is not subject to garnishment, either at law or in equity. *Gordon v. Warfield*, 74 Miss. 553, 21 So. 151 (1897); *Blair v. Kansas City, M. & B.R. Co.*, 76 Miss. 478, 24 So. 879 (1898).

7. Persons entitled to sue.

Where foreign corporations were doing business in Alabama, Tennessee and Mississippi, the foreign corporations were persons within the meaning of attachment statutes and could sue in the state or be sued or proceeded against, by attachment or otherwise, as individual nonresident debtors may be sued or proceeded against. *Snipes v. Commercial & Indus. Bank*, 225 Miss. 345, 82 So. 2d 895 (1955).

Where attachment proceedings in chancery were commenced by the state tax collector on behalf of the state against non-resident construction companies, wherein it was sought to make a municipality garnishee, to collect excise taxes claimed to be due from the defendant, to which the municipality was alleged to be indebted, a motion by the municipality to dismiss the proceedings as to it should not have been overruled, since the state collector was without authority to bring proceedings on behalf of the state to collect the tax. *City of Natchez v. Craig*, 191 Miss. 567, 3 So. 2d 837 (1941).

One having an equitable interest in a shipment of flour for his profits on the sale thereof, held entitled to attach the proceeds of the sale in the hands of a local bank, where both the buyer and seller are non-residents. *Regina Flour Mills Co. v. Lehmann*, 117 Miss. 575, 78 So. 515 (1918).

So may resident complainants. *Freeman v. Guion*, 19 Miss. (11 S. & M.) 58 (1848).

Non-resident complainants may sue. *Comstock v. Rayford*, 9 Miss. (1 S. & M.) 423 (1843); *Zecharie v. Bowers*, 11 Miss. (3

S. & M.) 641 (1844); *Freeman v. Malcom*, 19 Miss. (11 S. & M.) 53 (1848).

8. Nonresidents.

In a personal injury action against a domesticated foreign corporation, the trial court's exercise of jurisdiction as an attachment in chancery on the grounds of nonresidency did not violate the corporation's right to equal protection of the laws, even though it claimed to be a domestic corporation for all intents and purposes, where the state of incorporation retained, *inter alia*, supervisory power and the final authority to dissolve the corporation. *Louisville & N.R. Co. v. Hasty*, 360 So. 2d 925 (Miss. 1978), cert. denied, 439 U.S. 1003, 99 S. Ct. 614, 58 L. Ed. 2d 679 (1978).

Foreign railroad corporation with line of railroad within State and property subject to execution and liable to personal judgment held, nevertheless, "nonresident" within attachment statute. *Clark v. Louisville & N.R. Co.*, 158 Miss. 287, 130 So. 302 (1930).

"Non-resident" in chancery attachment suit held to include foreign insurance companies which have not become domesticated, notwithstanding that personal judgment may be obtained by service on insurance commissioner. *Aetna Ins. Co. v. Robertson*, 126 Miss. 387, 88 So. 883 (1921).

9. Persons subject to attachment.

Where, in litigation growing out of death and injuries sustained in a collision of two automobiles filed in the chancery court in the county where letters of administration of the decedent's estate were issued, complainants charged that the accident was due to the negligence of a construction company in obstructing the highway, charged negligence in the operation of his automobile on the part of another defendant, who it was alleged was an agent of a nonresident insurance company, and also charged, on information and belief, that another defendant had money and effects of the nonresident insurance company, and prayed for an attachment, and, upon appeal from the decrees in favor of complainants, the Supreme Court found no reversible error in the record, the judgment would not be

reversed in view of Mississippi Constitution § 147. *Mathews v. Thompson*, 231 Miss. 258, 95 So. 2d 438 (1957).

A foreign corporation is a person who may be proceeded against as an individual nonresident debtor, by attachment or otherwise. *Snipes v. Commercial & Indus. Bank*, 225 Miss. 345, 82 So. 2d 895 (1955).

Tendency of the legislature has been to enlarge the right of garnishment against public bodies, such as the State, counties and municipalities, even in law cases. *Mid-South Paving Co. v. Trinidad Asphalt Mfg. Co.*, 197 Miss. 751, 21 So. 2d 646 (1945), error overruled, 197 Miss. 751, 22 So. 2d 497 (1945).

State Highway Commission which held money due and owing to highway prime contractor, a non-resident corporation, could be sued as garnishee in a non-resident attachment in chancery, in suit by subcontractor to recover amount due from prime contractor, where the work was complete and finished and had been inspected and approved by the commission, and the garnishment involved no interruption of work or contest over instalment payments or the final payment. *Mid-South Paving Co. v. Trinidad Asphalt Mfg. Co.*, 197 Miss. 751, 21 So. 2d 646 (1945), error overruled, 197 Miss. 751, 22 So. 2d 497 (1945).

Suit in attachment cannot be maintained against national bank to recover proceeds of warrant delivered to it, and appearance by bank did not vest court with jurisdiction. *National City Bank v. Stupp Bros. Bridge & Iron Co.*, 147 Miss. 747, 113 So. 340 (1927).

A municipality cannot over its objection be proceeded against under the statute so as to bind its indebtedness to a non-resident defendant; and aside from the statute it is not liable to garnishment for debts arising from its exercise of governmental functions. *Dollman v. Moore*, 70 Miss. 267, 12 So. 23 (1892); *Dollar v. Allen W. Comm'n Co.*, 78 Miss. 274, 28 So. 876 (1900); *Clarksdale Compress & Storage Co. v. W.R. Caldwell Co.*, 80 Miss. 343, 31 So. 790 (1902).

A municipal corporation, or its board of school trustees, is not a "person" within the meaning of the statute; but it is intimated that aside from the statute, the

court would, under certain circumstances, where its public functions would not be hampered, sustain the garnishment of a municipality. *Dollman v. Moore*, 70 Miss. 267, 12 So. 23 (1892).

10. Procedure.

Procedural rules by which party seeks attachment in chancery are those provided by §§ 11-31-1 et seq., supplemented only by so much of Mississippi Rules of Civil Procedure as may be found not inconsistent with statute. *Universal Computer Servs., Inc. v. Lyall*, 464 So. 2d 69 (Miss. 1985).

Where chancery court acquired jurisdiction of local defendant under this section [Code 1942, § 2729], and the nonresident and other local defendants disappeared from the case, leaving no question of equity or chancery procedure therein, the court should not have dismissed the case against the remaining local defendant, but should have transferred it to the circuit court of the county of that defendant's residence, if he so desired. *Ragsdale v. Moore*, 24 So. 2d 332 (Miss. 1946).

In attachments in chancery, garnishee is made defendant in the original cause against the non-resident debtor, and the only duty of the garnishee is to answer whether he is indebted to, or has in his possession effects of, such non-resident debtor, and, if so, to deliver the same to the court if it so ordered for disposition by the court as it may adjudicate to be lawful and equitable. *Mid-South Paving Co. v. Trinidad Asphalt Mfg. Co.*, 197 Miss. 751, 21 So. 2d 646 (1945), error overruled, 197 Miss. 751, 22 So. 2d 497 (1945).

In an attachment and garnishment proceeding in chancery, the resident defendant, property in whose hands is sought to be attached as property of a nonresident defendant, is not a "garnishee" in the technical and procedural sense of a garnishee in an attachment at law, and no writ of garnishment should be issued to him. He is simply a defendant with all the rights and privileges as such, and should simply be summoned to answer the suit as any other defendant is summoned. *Gulf Ref. Co. v. Mauney*, 191 Miss. 526, 3 So. 2d 844 (1941).

Procedure in suit in chancery against non-resident debtor must be in accord

with that of chancery court. *Inman v. Travelers' Ins. Co.*, 153 Miss. 405, 121 So. 107 (1929); *Craig v. Gaddis*, 171 Miss. 379, 157 So. 684, 95 A.L.R. 1494 (1934).

Complainant not required to give bond before issuance of attachment. *I.B. Rowell & Co. v. Sandifer*, 129 Miss. 167, 91 So. 899 (1922).

11. Pleading.

Non-resident defendant in attachment, not served with summons, will not be heard in his plea to the jurisdiction of the court, to alleged non-ownership of the property levied upon. *Weaver Grocery Co. v. Cain Milling Co.*, 117 Miss. 781, 78 So. 769 (1918).

12. Parties.

In attachment suit in chancery against nonresident, alleged to own land in this state, for damages arising out of breach of warranty in sale of automobile, person claiming that lis pendens notice filed in suit created cloud upon his superior interest in the land may become party to suit on motion for purpose of protecting his interest, and by his appearance in suit intervenor does not waive necessity of issuance and levy of writ of attachment. *Ryals v. Douglas*, 205 Miss. 695, 39 So. 2d 311 (1949).

The presence of a resident defendant, in an attachment proceeding in chancery, who was alleged to have in his possession property of a nonresident defendant, was absolutely necessary to enable the complainant to proceed with her suit and to realize on any decree in her favor. *Gulf Ref. Co. v. Mauney*, 191 Miss. 526, 3 So. 2d 844 (1941).

The fact that a resident defendant in a chancery attachment proceeding, who was alleged to have property belonging to non-resident defendants, was referred to in the bill as a "garnishee" and not as a defendant, was of no consequence, where such resident defendant appeared and answered. *Gulf Ref. Co. v. Mauney*, 191 Miss. 526, 3 So. 2d 844 (1941).

To maintain a proceeding under this section [Code 1942, § 2729] it is necessary to have some resident of the state who has property or effects in his possession or who owes a debt to a nonresident made defendant, and consequently such party is

a necessary party to maintain an action under this section. *Clark v. Louisville & N.R. Co.*, 158 Miss. 287, 130 So. 302 (1930).

13. Judgment.

Defendant who has entered appearance in attachment suit in chancery is subject to judgment upon demand there involved. *Travelers' Ins. Co. v. Inman*, 157 Miss. 810, 126 So. 399 (1930), suggestion of error sustained in part, 157 Miss. 810, 128 So. 877 (1930).

If defendant is a non-resident and the res is within the territorial jurisdiction of the court and is brought into court by attachment or garnishment, the court may render a judgment in rem. *Delta Ins. & Realty Co. v. Interstate Fire Ins. Co.*, 113 Miss. 542, 74 So. 420 (1917).

14. —Pro confesso decree.

Chancery court cannot acquire jurisdiction to render a decree pro confesso against non-resident claimant of subject matter of suit. *Delta Ins. & Realty Agency v. Fourth Nat'l Bank*, 137 Miss. 855, 102 So. 846 (1925).

15. —Personal decrees.

Under this section [Code 1942, § 2729] court is authorized to give decree in personam against nonresident defendant on whom summons is personally served in suit by attachment in chancery for damages for breach of warranty arising out of sale of automobile. *Ryals v. Douglas*, 205 Miss. 695, 39 So. 2d 311 (1949).

This section [Code 1942, § 2729] is primarily a proceeding in rem to subject nonresidents' property to complainant's demand; and a personal judgment in attachment suit against nonresidents can be rendered only where defendant has been personally served or has entered appearance. *Clark v. Louisville & N.R. Co.*, 158 Miss. 287, 130 So. 302 (1930).

Personal judgment may be rendered against answering non-resident defendant in attachment in chancery. *Branham v. Drew Grocery Co.*, 145 Miss. 627, 111 So. 155 (1927).

Court of equity may, where a nonresident defendant has appeared and answered in the suit, render a personal decree against him for the balance of

complainant's debt not realized by sale of the attached property. *John E. Hall Comm'n Co. v. Foote*, 90 Miss. 422, 43 So. 676 (1907).

A personal decree against a non-resident defendant, under § 486 Code 1892 (Code 1906, § 536), cannot be rendered. *Rothrock Constr. Co. v. Port Gibson Mfg. Co.*, 80 Miss. 517, 32 So. 116 (1902), reh'g denied, 80 Miss. 517, 32 So. 484 (1902).

16. Res judicata.

A decree determining the merits of a cross bill against a defendant and favorably to a complainant which was a bank of another State was res judicata of such defendant's suit against bank commissioner of such other State under original and supplemental bills alleging facts set up in such cross bill, where court, at time of first suit, had same power sought to be invoked in second suit. *Brock v. Adler*, 180 Miss. 118, 177 So. 523 (1937).

17. Auxiliary relief.

18. —Injunction.

The complainant may, at the time of filing the bill, upon a sufficient and proper showing for it, obtain an injunction against the transfer or removal of the effects. *Trotter v. White*, 18 Miss. (10 S. & M.) 607 (1848).

19. —Receiver, appointment of.

Receiver under attachment in chancery where resident defendant is about to remit funds to non-resident defendant held proper. *Aetna Ins. Co. v. Robertson*, 131 Miss. 343, 94 So. 7 (1922), modified on suggestion of error, 131 Miss. 345, 95 So. 137 (1923), error dismissed, 263 U.S. 673, 44 S. Ct. 5, 68 L. Ed. 500 (1923), cert. denied, 263 U.S. 698, 44 S. Ct. 5, 68 L. Ed. 512 (1923), reh'g denied, 263 U.S. 678, 44 S. Ct. 132, 68 L. Ed. 502 (1923).

Chancery court may appoint receivers in attachment suits in chancery pendente lite for the property of non-residents. *Aetna Ins. Co. v. Robertson*, 126 Miss. 387, 88 So. 883 (1921).

20. Damages.

An affidavit in support of an attachment order must include a specific request for damages. A rough estimate of the value in question will not suffice. *Anderson v.*

Sonat Exploration Co., 523 So. 2d 1024 (Miss. 1988).

21. —Attorney fees, allowance of.

Where the attachment is maliciously brought, attorney's fees cannot be awarded defendant on dismissal of the bills; not being contemplated by the statute and being recoverable as damages

only after judgment in an action for malicious prosecution. *Rosenbaum v. Davis & Andrews Co.*, 111 Miss. 278, 71 So. 388 (1916).

Damages by way of attorneys' fees, etc., may not be allowed in attachments in chancery, as the statute makes no provision therefor. *Bonds v. L. Garvey & Co.*, 87 Miss. 335, 39 So. 492 (1905).

RESEARCH REFERENCES

ALR. Right of judgment creditor to demand that debtor's tender of payment be in cash or by certified check rather than by uncertified check. 82 A.L.R.3d 1199.

Joint Bank Account as Subject to Attachment, Garnishment, or Execution by Creditor of One Joint Depositor. 86 A.L.R.5th 527.

Am Jur. 6 Am. Jur. 2d, Attachment and Garnishment §§ 226 et seq.

36 Am. Jur. Proof of Facts 2d 149, Wrongful Attachment.

CJS. 7 C.J.S., Attachment §§ 23 et seq.

Law Reviews. Symposium on Mississippi Rules of Civil Procedure: Provisional and Final Remedies and Special Proceedings — Rules 64-71. 52 Miss. L. J. 183, March 1982.

The Effect of Bankruptcy and Encumbrances on Mineral Interests in Mississippi. 53 Miss L. J. 551, December, 1983.

1984 Mississippi Supreme Court Review: Civil Procedure. 55 Miss L. J. 49, March, 1985.

§ 11-31-2. Application for order of attachment; determination.

(1) Upon the filing of the bill of complaint, the complainant may apply for an order of attachment by presenting to the chancellor the bill, and an affidavit which shall include the following:

(a) A statement that the action is one described in Section 11-31-1, and is brought against a defendant described in said Section 11-31-1.

(b) A detailed statement of the facts and grounds which entitle the complainant to an order of attachment including a statement of the specific reasons why the complainant's ability to recover the amount of his claim may be endangered or impeded if the order of attachment is not issued.

(c) A statement of the amount the plaintiff seeks to recover.

(d) A statement that the complainant has no information or belief that the claim is discharged in a proceeding under the Federal Bankruptcy Act (11 U.S.C., Section 1, et seq.), or that the prosecution is stayed in a proceeding under the Federal Bankruptcy Act.

(e) A description of the property to be attached under the writ of attachment and a statement that the complainant is informed and believes that such property is not exempt from attachment or seizure under Section 85-3-1.

(f) A listing of other persons known to the complainant who may have an interest in the property sought to be attached together with a description of such interest.

(2) The chancellor shall examine the affidavit and bill of complaint and may, in term time or in vacation, issue an order of attachment with respect to such property under the following conditions:

(a) The chancellor finds that unless the order of attachment is issued, the complainant's ability to recover the amount of his claim may be significantly impaired or impeded.

(b) The chancellor finds that the affidavit establishes a prima facie case demonstrating the complainant's right to recover on his claim against the defendant.

(c) The complainant gives security in an amount satisfactory to the chancellor to abide further orders of the court and to protect the defendant from injury should the action of attachment be judicially determined to have been wrongfully brought.

(3)(a) If such an order of attachment is issued, the defendant shall, upon request, be entitled to an immediate post-seizure hearing to seek dissolution of the order of attachment. Such post-seizure hearing shall have precedence on the docket of the chancery court over all other matters except similar matters previously filed. At such hearing, the chancellor shall order dissolution of the order of attachment unless the complainant establishes by satisfactory proof the grounds upon which the order was issued, including the existence of a claim as described in Section 11-31-1, and the impairment or impediment which a failure to continue the attachment could bring to the complainant's ability to recover the amount of such debt. An appearance by the defendant at the post-seizure hearing shall be considered a special appearance and not a general appearance for purposes of personal jurisdiction over the defendant.

(b) In the alternative, a debtor may regain immediate possession of the property attached by giving security satisfactory to the chancellor in an amount equal to one hundred twenty-five percent (125%) of the value of the property attached or one hundred twenty-five percent (125%) of the amount of the claim, whichever is less.

(c) If the chancellor should determine that the attachment was not brought in good faith, then the chancellor in his discretion may award actual damages (including reasonable attorney's fees) to the defendant.

SOURCES: Laws, 1980, ch. 467, § 1, eff from and after July 1, 1980.

Cross References — Jurisdiction of chancery court, see § 11-31-1.
Seizure of person or property, see Miss. R. Civ. P. 64.

JUDICIAL DECISIONS

1. In general.

State statute authorizing pre-judgment ex parte attachment of realty, without bond and absent exigent circumstances, violated due process clause, as applied, since (1) property interests affected were

significant, (2) risk of erroneous deprivation of due process was substantial, (3) post-deprivation safeguards did not adequately reduce risk of such error, (4) interests in favor of ex parte attachment were too minimal to obviate need for pre-depri-

vation hearing, (5) state's substantive interest in protecting rights of plaintiff could not be more weighty than plaintiff's interest, (6) remedy of attachment historically was predicated on some circumstances not here present, and (7) only Connecticut allowed such procedure. *Connecticut v. Doeher*, 501 U.S. 1, 111 S. Ct. 2105, 115 L. Ed. 2d 1 (1991).

Attachment should be dissolved, where no substantial impairment or impediment would accrue to insured by failure to maintain attachment over insurance company's property. *Woodmen of World Life Ins. Soc. v. Leitaker*, 703 F. Supp. 1245 (S.D. Miss. 1988).

Mississippi Attachment Statute (§§ 11-31-1 et seq.) is not unconstitutional notwithstanding defendant's contentions that (1) it fails to require nexus between property attached and underlying claim, (2) it does not provide for pre-seizure

notice or pre-seizure hearing, (3) it prohibits defendant from making limited appearance to defend his claim to property attached, (4) its bond requirements are unfair and discriminatory as to attached defendant, and (5) it is silent as to future accruing debts. *Estate of Portnoy v. Cessna Aircraft Co.*, 603 F. Supp. 285 (S.D. Miss. 1985).

An affidavit in support of an attachment order must include a specific request for damages. A rough estimate of the value in question will not suffice. *Anderson v. Sonat Exploration Co.*, 523 So. 2d 1024 (Miss. 1988).

Mississippi Rule of Civil Procedure 64, regulating procedural aspects of attachment suit, requires that procedural requirements of § 11-31-2 be met. *Universal Computer Servs., Inc. v. Lyall*, 464 So. 2d 69 (Miss. 1985).

RESEARCH REFERENCES

Am Jur. 6 Am. Jur. 2d, Attachment and Garnishment §§ 261 et seq.

2B Am. Jur. Pl & Pr Forms (Rev), Attachment and Garnishment, Form 513 (motion — to dissolve set aside and vacate order granting ex parte attachment).

CJS. 7 C.J.S., Attachment §§ 50 et seq.

Law Reviews. Symposium on Mississippi Rules of Civil Procedure: Provisional and Final Remedies and Special Proceedings — Rules 64-71. 52 Miss. L. J. 183, March 1982.

§ 11-31-3. Attaching property or indebtedness.

When a bill shall be filed for an attachment of the effects of a nonresident, absent or absconding debtor in the hands of persons in this state, or of the indebtedness of persons in this state to such nonresident, absent or absconding debtor, it shall be sufficient to bind such effects or indebtedness that the order of attachment together with a copy of the bill of complaint and affidavit be served upon the persons possessing such effects or owing such indebtedness.

SOURCES: Codes, 1880, § 1898; 1892, § 487; Laws, 1906, § 537; Hemingway's 1917, § 294; Laws, 1930, § 174; Laws, 1942, § 2730; Laws, 1980, ch. 467, § 2, eff from and after July 1, 1980.

Cross References — Seizure of person or property, see Miss. R. Civ. P. 64.

JUDICIAL DECISIONS

1. In general.
2. Jurisdiction.

3. Nonresident.
4. Persons entitled.

5. Property subject.
6. Lien.
7. Judgment.

1. In general.

Mississippi Attachment Statute (§§ 11-31-1 et seq.) is not unconstitutional notwithstanding defendant's contentions that (1) it fails to require nexus between property attached and underlying claim, (2) it does not provide for pre-seizure notice or pre-seizure hearing, (3) it prohibits defendant from making limited appearance to defend his claim to property attached, (4) its bond requirements are unfair and discriminatory as to attached defendant, and (5) it is silent as to future accruing debts. *Estate of Portnoy v. Cessna Aircraft Co.*, 603 F. Supp. 285 (S.D. Miss. 1985).

That Code commissioners moved statute from one chapter to another did not change statute. *Craig v. Gaddis*, 171 Miss. 379, 157 So. 684, 95 A.L.R. 1494 (1934).

Garnishment statutes held inapplicable to attachments in chancery, except as otherwise provided by statute. *Craig v. Gaddis*, 171 Miss. 379, 157 So. 684, 95 A.L.R. 1494 (1934).

Attachment statutes held inapplicable to attachments in chancery except as otherwise provided by statute. *Craig v. Gaddis*, 171 Miss. 379, 157 So. 684, 95 A.L.R. 1494 (1934).

2. Jurisdiction.

Service of a writ of attachment on a railroad's station agent is sufficient to bind the money and effects of the company in his hands at the time. *Illinois Cent. R.R. v. McDaniel*, 246 Miss. 600, 151 So. 2d 805 (1963).

Words "persons in this State" mean persons residing in this State, and process on nonresidents temporarily residing in State does not give court jurisdiction over them. *Alabama Power Co. v. Jackson*, 181 Miss. 691, 179 So. 571 (1938).

Chancery court of county in which attachment suit was filed against domestic bank, which bill alleged was domiciled in another county, and foreign bank, to which garnished domestic corporation, domiciled in another county, was alleged to be indebted, to recover amount of check on ground of banks' negligence in collection

thereof, had no territorial jurisdiction of domestic bank, between which and garnishee there was neither privity nor connection. *Estes v. Bank of Walnut Grove*, 172 Miss. 499, 159 So. 104 (1935).

Court, by personal service on agent of foreign corporation doing business in this State, acquired jurisdiction of corporation, garnishee in suit by non-resident employee-creditor, and could require answer and condemn any indebtedness due by corporation to its employee-creditor under employment contract made and performable outside State. *Bean v. Bean*, 166 Miss. 434, 147 So. 306 (1933).

If the garnishee be personally served with process in this state, the court acquires jurisdiction over him and can garnish the debt due the debtor of plaintiff and condemn it, provided the garnishee could himself be sued by his creditors in this state, regardless of the original situs of the debt outside of the state. *Southern Pac. R.R. v. A.J. Lyon & Co.*, 99 Miss. 186, 54 So. 728, *Am. Ann. Cas.* 1913D,800 (1911), error overruled, 54 So. 784 (Miss. 1911).

Where complainant fails to show that there was any property belonging to defendant in the hands of the third party when the attachment was served, the court obtained no jurisdiction to entertain the suit and order a statement of accounts. *Louis Werner Sawmill Co. v. Sheffield*, 89 Miss. 12, 42 So. 876 (1907).

An attachment was sued out against a resident debtor and his non-resident vendee of a stock of goods, the bill alleging the sale to be fraudulent and seeking to hold him for their value. The court retained jurisdiction against objection that the vendee's liability, if any, was not such a debt as would support an attachment against him. The Supreme Court declined to pass upon the question because of the inhibition of § 147 of the Constitution. *Barrett v. Carter*, 69 Miss. 593, 13 So. 625 (1891).

3. Nonresident.

Where foreign corporations were doing business in Alabama, Tennessee and Mississippi, the foreign corporations were persons within the meaning of attachment statutes and they themselves could sue in the state and they are liable to be

sued or proceeded against, by attachment or otherwise, as individual nonresident debtors may be sued or proceeded against. *Snipes v. Commercial & Indus. Bank*, 225 Miss. 345, 82 So. 2d 895 (1955).

One who resides in Mississippi becomes a nonresident thereof, within the meaning of the statute, when he removes therefrom, intending to remain out permanently, or for a definite period of time, although he frequently and continuously visits the state and remains there for short intervals of time, and therefore an attachment against such a person should not be quashed, on the ground that he is a resident. *Bonds v. Ross*, 192 Miss. 610, 7 So. 2d 554 (1942).

Place of its creation ordinarily determines residence of corporation within the meaning of attachment statute; foreign corporations doing business in the state under laws thereof will be deemed "non-resident" within attachment statute. *Central W. Dev. Co. v. Lewis*, 142 Miss. 428, 107 So. 557 (1926).

4. Persons entitled.

One having an equitable interest in a shipment of flour for his profits on the sale thereof, held entitled to attach the proceeds of the sale in the hands of a local bank, where both the buyer and seller are non-residents. *Regina Flour Mills Co. v. Lehmann*, 117 Miss. 575, 78 So. 515 (1918).

5. Property subject.

Order of attachment issued by chancellor, purporting to bind property, effects, and money in hands of co-defendants owned by or owed to nonresident defendant airplane manufacturer, subjecting any such property or indebtedness now or hereafter owned by or owing to airplane manufacturer to demand of complainant, is impermissible under Mississippi statute and must be modified to bind only that property or indebtedness existing at time writ of attachment was served and any subsequent property or indebtedness owned by or owing to airplane manufacturer up to time respective defendants' answers were filed, or if no answer was

filed, until 30 days after service was rendered. *Estate of Portnoy v. Cessna Aircraft Co.*, 603 F. Supp. 285 (S.D. Miss. 1985).

The automobile of a nonresident may be attached in an action for damages caused by a collision in which it was involved. *Associates Disct. Corp. v. Clark*, 240 Miss. 723, 128 So. 2d 535 (1961).

What "effects" bound in hands of resident defendant stated. The word "effects" is broader in signification than the word "goods" and it covers all kinds of personal property. *Aetna Ins. Co. v. Robertson*, 126 Miss. 387, 88 So. 883 (1921).

Agent may attach property sold for commission but cannot attach property for seller's debt; attachment fails where buyer was garnished after paying purchase money. *Slattery v. P.L. Renoudet Lumber Co.*, 125 Miss. 229, 87 So. 888 (1921).

6. Lien.

The attachment of the property of a nonresident creates a lien which attaches when the writ is served. *Associates Disct. Corp. v. Clark*, 240 Miss. 723, 128 So. 2d 535 (1961).

Lien exists only when property seized; lien does not relate back to filing of bill. *Slattery v. P.L. Renoudet Lumber Co.*, 125 Miss. 229, 87 So. 888 (1921).

7. Judgment.

A decree determining the merits of a cross bill against a defendant and favorably to a complainant which was a bank of another State was *res judicata* of such defendant's suit against bank commissioner of such other State under original and supplemental bills alleging facts set up in such cross bill, where court, at time of first suit, had same power sought to be invoked in second suit. *Brock v. Adler*, 180 Miss. 118, 177 So. 523 (1937).

If defendant is a non-resident and the res is within the territorial jurisdiction of the court and is brought into court by attachment or garnishment, the court may render a judgment in rem. *Delta Ins. & Realty Co. v. Interstate Fire Ins. Co.*, 113 Miss. 542, 74 So. 420 (1917).

RESEARCH REFERENCES

Am Jur. 6 Am. Jur. 2d, Attachment and Garnishment §§ 261 et seq.

CJS. 7 C.J.S., Attachment §§ 24 et seq.

Law Reviews. Symposium on Missis-

issippi Rules of Civil Procedure: Provisional and Final Remedies and Special Proceedings — Rules 64-71. 52 Miss. L. J. 183, March 1982.

§ 11-31-5. Levy on land.

If the land of the nonresident, absent or absconding debtor be the subject of such suit, and an order of attachment be issued, the order shall be levied by the sheriff or other officer as such writs of law are required to be levied on land, and shall have like effect.

SOURCES: Codes, 1880, § 1889; 1892, § 488; Laws, 1906, § 538; Hemingway's 1917, § 295; Laws, 1930, § 175; Laws, 1942, § 2731; Laws, 1980, ch. 467, § 3, eff from and after July 1, 1980.

Cross References — Seizure of person or property, see Miss. R. Civ. P. 64.

JUDICIAL DECISIONS

1. In general.

In attachment suit in chancery against land of nonresident, no lien is created until mandatory provisions of Code 1942, §§ 756, 1904, and this section [Code 1942, § 2731] are complied with by issuance

and levy of writ of attachment and filing of notice of levy, and mere filing of lis pendens notice is insufficient to create lien. Ryals v. Douglas, 205 Miss. 695, 39 So. 2d 311 (1949).

RESEARCH REFERENCES

CJS. 7 C.J.S., Attachment §§ 62 et seq.

Law Reviews. Symposium on Missis-

sippi Rules of Civil Procedure: Provisional and Final Remedies and Special Proceedings — Rules 64-71. 52 Miss. L. J. 183, March 1982.

§ 11-31-7. Writs of sequestration for personal property.

Writs of sequestration may be issued for personal property in such cases as in others.

SOURCES: Codes, 1880, § 1900; 1892, § 489; Laws, 1906, § 539; Hemingway's 1917, § 296; Laws, 1930, § 176; Laws, 1942, § 2732.

Cross References — Writ of sequestration, see §§ 11-29-1 et seq.
Seizure of person or property, see Miss. R. Civ. P. 64.

RESEARCH REFERENCES

Law Reviews. Symposium on Missis-

issippi Rules of Civil Procedure: Provisional and Final Remedies and Special Proceed-

§ 11-31-9. Publication for appearance of defendant.

The nonresident, absent or absconding debtor shall be made a party to such suit by publication of summons as in other cases, and may appear and plead, demur or answer to the bill without giving security. If such debtor fails to appear, the court shall have power to make any necessary orders to restrain the defendants within this state from paying, conveying away or secreting the debts by them owing, or the effects in their hands belonging to, the nonresident, absent or absconding defendant, and may order such debts to be paid or such effects to be delivered to the complainant on his giving security for the return thereof in such manner as the court may direct.

SOURCES: Codes, 1857, ch. 62, art. 61; 1880, § 1901; 1892, § 490; Laws, 1906, § 540; Hemingway's 1917, § 297; Laws, 1930, § 177; Laws, 1942, § 2733; Laws, 1980, ch. 467, § 4, eff from and after July 1, 1980.

Cross References — Publication of notice in attachment cases, see §§ 11-33-37 et seq.

Defendant defending suit without replevying property, see § 11-33-81.

Seizure of person or property, see Miss. R. Civ. P. 64.

JUDICIAL DECISIONS

1. In general.

Service of process on the station agent of a foreign railroad company is sufficient without publication in a newspaper. *Illinois Cent. R.R. v. McDaniel*, 246 Miss. 600, 151 So. 2d 805 (1963).

In an attachment suit brought in a chancery court under Code 1942, § 2729 by an Alabama citizen to recover damages from an Alabama corporation for personal injuries received as a result of a railroad crossing accident in Alabama, and to attach funds or property in the hands of a Mississippi corporation, where the plaintiff did not get process by publication of summons on the nonresident defendant as required by this section, but relied solely on the attempted personal service executed on an employee, who was not such an agent of defendant upon whom process could be served, the chancellor committed reversible error in overruling defendant's motion to dismiss for want of jurisdiction, even though the Mississippi corporation had answered admitting an indebtedness due to the defendant. *Alabama, Tenn. & N.R. Co. v. Howell*, 244 Miss. 157, 141 So. 2d 242 (1962).

Attachment of real property within the state belonging to nonresident automobile

owner held to confer jurisdiction to determine rights of the beneficiary of a deed of trust thereon, against a garnished nonresident insurer of the automobile against theft, though the nonresident automobile owner was not served by publication with notice of the suit. *Coahoma County Bank & Trust Co. v. Feinberg*, 241 Miss. 381, 128 So. 2d 562 (1961).

Seizure of automobile of nonresident owner under writ of sequestration to enforce mechanic's lien for labor performed on such automobile, wherein nonresident credit company was described as having some interest in the subject matter and served by publication, court was without jurisdiction to order a sale of the property, where nonresident debtor had no property in the state or in the hands of residents of the state, there was no showing as to threatened removal, concealment or transfer, and no security was given to abide the further orders of the court for restoring the property to the absent defendant on his appearing and answering the bill within two years. *Universal Credit Co. v. Linn Motor Co.*, 195 Miss. 565, 15 So. 2d 44 (1943).

Nonresident defendants, whose post-office addresses were not shown by proof of

publication of notices to them, were not in court, which had no power to render judgment or apply testimony against them. *Sellers v. Powell*, 168 Miss. 682, 152 So. 492 (1934).

In order to maintain an attachment in chancery, the nonresident debtor must be made a party by publication of summons as in other cases, and, therefore, allegation that principal defendant was Louisiana corporation with principal place of business in New Orleans held not to authorize decree pro confesso. *Commercial Credit Co. v. Cook*, 164 Miss. 725, 143 So. 863 (1932).

Statute requiring publication of notices to nonresidents of action against them must be strictly complied with to confer jurisdiction on State court. *Commercial Credit Co. v. Cook*, 164 Miss. 725, 143 So. 863 (1932); *Sellers v. Powell*, 168 Miss. 682, 152 So. 492 (1934).

Appearance of nonresident defendant for sole purpose of removal was not such appearance that when cause was remanded, defendant was in state court without necessity of valid process. *McCoy v. Watson*, 153 Miss. 416, 121 So. 116 (1929), error overruled, 154 Miss. 307, 122 So. 368 (1929).

RESEARCH REFERENCES

Law Reviews. Symposium on Mississippi Rules of Civil Procedure: Provisional and Final Remedies and Special Proceed-

ings — Rules 64-71. 52 Miss. L. J. 183, March 1982.

§ 11-31-11. Complainant to give security after decree rendered.

If a decree be rendered in such case without the appearance of the absent debtor, the court, before any proceedings to satisfy said decree, shall require the complainant to give security for abiding such further orders as may be made, for restoring of the estate or effects to the absent defendant, on his appearing and answering the bill within two years; and if the complainant shall not give such security, the effects shall remain under the direction of the court, in the hands of a receiver, or otherwise, for such time, and shall then be disposed of as the court may direct.

SOURCES: Codes, 1857, ch. 62, art. 62; 1880, § 1902; 1892, § 491; Laws, 1906, § 541; Hemingway's 1917, § 298; Laws, 1930, § 178; Laws, 1942, § 2734.

Cross References — Seizure of person or property, see Miss. R. Civ. P. 64.

JUDICIAL DECISIONS

1. In general.

In attachment suit against absent nonresident debtor, order of court, directing clerk to deliver contents of defendant's safety deposit box to bank, need not provide that this should not be done until security be given for abiding such further orders as may be made for restoring of the estate to the absent defendant, but such security must be required by the clerk under this section [Code 1942, § 2734] before he so delivers the property. *Jackson*

State Nat'l Bank v. Polk, 35 So. 2d 430 (Miss. 1948).

Complainant in suit to enforce mechanic's lien in which nonresident credit company was served by publication was not entitled to have the property sold to satisfy its lien without having given security for abiding such further orders as might be made, for restoring the property to the absent defendant on his appearing and answering the bill within two years. *Universal Credit Co. v. Linn Motor Co.*, 195

Miss. 565, 15 So. 2d 44 (1943).

Seizure of automobile of nonresident owner under writ of sequestration to enforce mechanic's lien for labor performed on such automobile, wherein nonresident credit company was described as having some interest in the subject matter and served by publication, court was without jurisdiction to order a sale of the property, where nonresident debtor had no property in the state or in the hands of residents of the state, there was no showing as to threatened removal, concealment or transfer, and no security was given to abide the further orders of the court for restoring the property to the absent defendant on his appearing and answering the bill within two years. *Universal Credit Co. v. Linn Motor Co.*, 195 Miss. 565, 15 So. 2d 44 (1943).

Where decree is rendered against nonresident defendant on publication only, without appearance, refunding bond required by this section [Code 1942, § 2734] must be then given before any proceedings to enforce and satisfy decree and sale without it is void. *Seay v. Wofford*, 141 Miss. 888, 106 So. 751 (1926), motion overruled, 106 So. 927 (Miss. 1926).

Bond not required of complainant before issuance of attachment in chancery. *I.B. Rowell & Co. v. Sandifer*, 129 Miss. 167, 91 So. 899 (1922).

An execution issued before the security required is given is void and sale thereunder passes no title. *Carter v. Brandy*, 71 Miss. 240, 15 So. 790 (1894).

RESEARCH REFERENCES

Am Jur. 6 *Am. Jur.* 2d, Attachment and Garnishment §§ 530 et seq.

CJS. 7 *C.J.S.*, Attachment §§ 116 et seq.

Law Reviews. Symposium on Missis-

sippi Rules of Civil Procedure: Provisional and Final Remedies and Special Proceedings — Rules 64-71. 52 *Miss. L. J.* 183, March 1982.

CHAPTER 33

Attachment at Law Against Debtors

SEC.

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- 11-33-5. Attachment against partners.
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- 11-33-67. Officer bound if bond insufficient.
- 11-33-69. Claim of third person to attached property.
- 11-33-71. Property in danger of waste to be sold pending suit.
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- 11-33-75. Death of defendant does not abate action.
- 11-33-77. The declaration and subsequent pleadings.
- 11-33-79. Judgment by default.
- 11-33-81. Defendant may defend without replevying property.
- 11-33-83. Answer traversing truth of alleged attachment grounds; trial of issue.
- 11-33-85. Answer traversing truth of alleged attachment grounds; damages in favor of defendant.
- 11-33-87. Answer traversing truth of alleged attachment grounds—effect of decision in plaintiff's favor.
- 11-33-89. Property assessment and judgment in certain cases.
- 11-33-91. Voluntary dismissal and damages.
- 11-33-93. Judgment in case debt not due.
- 11-33-95. Judgment for damages pleadable as payment.

- 11-33-97. Discharge of attachment not to affect action.
- 11-33-99. Attachment preserved by appeal.
- 11-33-101. Intervention by other creditors.
- 11-33-103. But one trial.
- 11-33-105. Proceedings before justice court judge.
- 11-33-107. Trial before justice of the peace.

§ 11-33-1. Application.

The remedy by attachment shall apply to all actions or demands founded upon any indebtedness, or for the recovery of damages for the breach of any contract, express or implied, and to actions founded upon any penal statutes.

SOURCES: Codes, 1857, ch. 52, art. 1; 1871, § 1419; 1880, § 2414; 1892, § 125; Laws, 1906, § 129; Hemingway's 1917, § 121; Laws, 1930, § 119; Laws, 1942, § 2675.

Cross References — Remedial writs grantable by Supreme Court and circuit judges and chancellors, see § 9-1-19.

Remedial orders in actions in which the right to real or personal property is in controversy, see § 11-7-169.

Proceedings in replevin, attachment, and enforcement of statutory liens before justices of the peace, see § 11-9-135.

Writ of sequestration, see §§ 11-29-1 et seq.

Attachments against debtors in chancery court, see §§ 11-31-1 et seq.

Summoning of creditor of judgment debtor in garnishment proceeding, see § 11-35-3.

Authority of an airport authority to attach the equipment of debtors of the authority, see § 61-3-15.

Exemption of income or principal from an employee trust plan, see § 71-1-43.

Attachment of goods covered by negotiable document, see § 75-7-602.

Attachment of collateral subject to security interest, see § 75-9-501.

Exempt personal property, see § 85-3-1.

Nonresident or unknown parties in lien cases, see § 85-7-33.

Apportionment of rent, see §§ 89-7-9 et seq.

Seizure of person or property, see Miss. R. Civ. P. 64.

JUDICIAL DECISIONS

1. In general.

State statute authorizing pre-judgment ex parte attachment of realty, without bond and absent exigent circumstances, violated due process clause, as applied, since (1) property interests affected were significant, (2) risk of erroneous deprivation of due process was substantial, (3) post-deprivation safeguards did not adequately reduce risk of such error, (4) interests in favor of ex parte attachment were too minimal to obviate need for pre-deprivation hearing, (5) state's substantive interest in protecting rights of plaintiff could not be more weighty than plaintiff's interest, (6) remedy of attachment historically was predicated on some circum-

stances not here present, and (7) only Connecticut allowed such procedure. *Connecticut v. Doeher*, 501 U.S. 1, 111 S. Ct. 2105, 115 L. Ed. 2d 1 (1991).

The statutory scheme providing for attachment at law against debtors was constitutionally deficient where it made no provision for pre-attachment notice or hearing, where writs of attachment could be authorized by a nonjudicial officer, and where it failed to provide defendants with an immediate post-seizure hearing; as a matter of fairness and justice, sums owed the principal defendant by nonresident attachment defendants arising out of transactions having no connection with Mississippi would be excluded from gar-

nishment. *Mississippi Chem. Corp. v. Chemical Constr. Corp.*, 444 F. Supp. 925 (S.D. Miss. 1977).

Georgia statutes authorizing garnishment of property other than wages in pending suits, but not providing for notice, hearing, or participation by judicial officer, held violative of due process clause of Fourteenth Amendment. *North Ga. Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601, 95 S. Ct. 719, 42 L. Ed. 2d 751 (1975).

Where defendant traded to the plaintiff two automobiles he knew to be stolen property and also by bill of sale the defendant expressly warranted the title to the property, and the automobiles, so traded to plaintiffs, were repossessed by the original owners, the obligation was fraudulently contracted and furnished sufficient ground for attachment of defendant's property. *Davis v. Shemper*, 210 Miss. 201, 49 So. 2d 253 (1950), error overruled, 210 Miss. 208, 50 So. 2d 143 (1951).

An attachment will lie for unliquidated damages arising out of a contract. *John E. Hall Comm'n Co. v. R.L. Crook & Co.*, 87 Miss. 445, 40 So. 20 (1906), vacated, 87 Miss. 445, 40 So. 1006 (1906).

Where a foreign corporation sold grain to a domestic partnership and delivered grain of a quality inferior to that contracted for, the purchaser's demand for damages became due immediately upon the delivery of the grain and the payment

of the agreed price, and hence the purchaser was entitled to sue out an attachment at that time. *John E. Hall Comm'n Co. v. R.L. Crook & Co.*, 87 Miss. 445, 40 So. 20 (1906), vacated, 87 Miss. 445, 40 So. 1006 (1906).

Wherever assumpsit will lie for the breach of an implied contract the case is within the statute. *Nethery v. Belden*, 66 Miss. 490, 6 So. 464 (1889).

Whenever assumpsit will lie for the breach of an implied contract, attachments may be maintained to recover damages therefor, although the breach of the contract may be tortious. *Nethery v. Belden*, 66 Miss. 490, 6 So. 464 (1889).

An attachment will lie to recover for a breach of warranty. *Hambrick v. Wilkins*, 65 Miss. 18, 3 So. 67, 7 Am. St. R. 631 (1887).

A county can sue out an attachment. *State v. Fortinberry*, 54 Miss. 316 (1877).

The attachment law applies to transactions occurring before its adoption as well as afterward. *Green v. Anderson & Hilzheim*, 39 Miss. 359 (1860).

The remedy does not extend to actions ex delicto. *J.B. Fellows & Co. v. Brown*, 38 Miss. 541 (1860).

In order to entitle a party to an attachment, he must have a present subsisting debt or demand; a mere surety cannot attach. *Henderson, Terry & Co. v. Thornton*, 37 Miss. 448, 75 Am. Dec. 70 (1859).

RESEARCH REFERENCES

ALR. What is an action for "debt" within attachment or garnishment statute. 12 A.L.R.2d 787.

Attachment in alienation of affections or criminal conversation case. 67 A.L.R.2d 527.

Reformation of deed or mortgage as against intervening rights of attaching judgment creditor. 79 A.L.R.2d 1180.

Right of judgment creditor to demand that debtor's tender of payment be in cash or by certified check rather than by uncertified check. 82 A.L.R.3d 1199.

Recovery of damages for mental anguish, distress, suffering, or the like, in action for wrongful attachment, garnishment, sequestration, or execution. 83 A.L.R.3d 598.

Modern views as to validity, under federal constitution, of state prejudgment attachment, garnishment, and replevin procedures, distraint procedures under landlords' or innkeepers' lien statutes, and like procedures authorizing summary seizure of property. 18 A.L.R. Fed. 223.

Am Jur. 6 Am. Jur. 2d, Attachment and Garnishment §§ 45, 46, 49, 60 et seq.

2 Am. Jur. Pl & Pr Forms (Rev), Attachment and Garnishment, Forms 1 et seq.

2 Am. Jur. Proof of Facts, Attachment, Proof No. 1 (wrongful attachment).

CJS. 7 C.J.S., Attachment §§ 12 et seq.

Law Reviews. Symposium on Mississippi Rules of Civil Procedure: Provisional and Final Remedies and Special Proceed-

ings-Rules 64-71. 52 Miss. L. J. 183,
March 1982.

§ 11-33-3. Suit against one or more debtors among joint debtors.

The creditor may sue out an attachment against one or more of joint debtors or joint and several debtors, whether primarily or secondarily liable, without affecting his rights as against the others.

SOURCES: Codes, 1892, § 126; Laws, 1906, § 130; Hemingway's 1917, § 122; Laws, 1930, § 120; Laws, 1942, § 2676.

Cross References — Seizure of person or property, see Miss. R. Civ. P. 64.

JUDICIAL DECISIONS

1. In general.

An indorser of a note cannot in an action against himself and the maker, in which an attachment has been issued on the ground of nonresidence, file a plea in abatement setting up that the maker was a resident when the attachment was issued. *Timberlake v. Thayer*, 16 So. 878 (Miss. 1895).

This section [Code 1942, § 2676] is use-

less except to declare the law as existing independently of it. *Cohen v. Gamble*, 71 Miss. 478, 15 So. 236 (1894).

The attachment may be against one debtor and the declaration in the cause be against several, provided the debt owing by the debtors not attached be due when the declaration is filed against them. *Terry v. Curd & Sinton Mfg. Co.*, 66 Miss. 394, 6 So. 229 (1889).

RESEARCH REFERENCES

ALR. Joint Bank Account as Subject to Attachment, Garnishment, or Execution by Creditor of One Joint Depositor. 86 A.L.R.5th 527.

Am Jur. 6 Am. Jur. 2d, Attachment and Garnishment §§ 68, 238.

CJS. 7 C.J.S., Attachment § 11.

§ 11-33-5. Attachment against partners.

In case one or more partners shall be liable to attachment on any of the enumerated grounds therefor, save the first, an attachment may be maintained against said partner, or all of the partners, by the partnership creditors. The property of the partnership, in either case, may be levied on and dealt with in all respects as if the grounds of attachment existed as to all the partners. The effects levied upon may be replevied by the partners sued by giving bond as other defendants in attachments, or, if they fail to do so, any partner not sued therein may replevy the same in like manner; but, by doing so, such partner shall thereby become a party defendant to the suit for all purposes, and judgment may be rendered on his bond against the obligors therein as in other attachment cases.

SOURCES: Codes, 1892, § 127; Laws, 1906, § 131; Hemingway's 1917, § 123; Laws, 1930, § 121; Laws, 1942, § 2677.

Cross References — Seizure of person or property, see Miss. R. Civ. P. 64.

JUDICIAL DECISIONS

1. In general.

An attachment may be maintained by firm creditors against all members of a partnership on removal of one partner out of state. *AMOCO v. H. Booth Lumber Co.*, 137 Miss. 404, 102 So. 262 (1924).

Where one or more of the partners reside in this state, attachment cannot be sustained on ground of nonresidence. *Barney & Hines v. Moore-Haggerty Lum-*

ber Co., 95 Miss. 118, 48 So. 232 (1909).

This section [Code 1942, § 2677] is an enabling act and does not abridge any right; hence it does not hinder a creditor of a partnership from attaching on the ground of nonresidence the property of any member of the partnership, the right to do so existing by virtue of Code 1892, § 2353 (Code 1906 § 2683). *Cohen v. Gamble*, 71 Miss. 478, 15 So. 236 (1894).

RESEARCH REFERENCES

ALR. Residence of partnership for purposes of statutes authorizing attachment or garnishment on ground of nonresidence. 9 A.L.R.2d 471.

Am Jur. 6 Am. Jur. 2d, Attachment and Garnishment §§ 238, 255.

CJS. 7 C.J.S., Attachment § 26.

§ 11-33-7. Attachments against nonresidents jointly indebted.

When two or more persons, not residing in this state, are jointly indebted, the writ of attachment may be issued against such debtors, or any of them, by their proper names or by the name of the partnership, or by whatever other names such debtors may be called or known in this state, or against the executors or administrators of them or any or either of them, and may be levied upon the separate or joint estate or both of such debtors, and the lands, tenements, money, goods, chattels, effects, rights and credits of such debtors, or any or either of them, which shall be liable to be seized and taken for the satisfaction of any debt or demand for which an attachment will lie.

SOURCES: Codes, *Hutchinson's* 1848, ch. 56, art. 4 (12); 1857, ch. 52, art. 5; 1871, § 1431; 1880, § 2420; 1892, § 128; Laws, 1906, § 132; *Hemingway's* 1917, § 124; Laws, 1930, § 122; Laws, 1942, § 2678.

Cross References — Attachments in chancery court, see §§ 11-31-1 et seq. Seizure of person or property, see Miss. R. Civ. P. 64.

RESEARCH REFERENCES

ALR. Residence of partnership for purposes of statutes authorizing attachment or garnishment on ground of nonresidence. 9 A.L.R.2d 471.

§ 11-33-9. Grounds for attachment—affidavit.

The creditor, his agent or attorney, shall make oath before a judge of the supreme court, a judge of a circuit court, or a chancellor, or before a clerk of the circuit court or chancery court or the deputy of such clerk, or any justice court judge, or the mayor of any city, town or village, of the amount of his debt or demand, to the best of his knowledge and belief, and shall also make oath, to

the best of his knowledge and belief, to one or more of the following grounds for attachment:

(1) That the defendant is a foreign corporation, or a nonresident of this state; or

(2) That he has removed, or is about to remove, himself or his property out of this state; or

(3) That he so absconds or conceals himself that he cannot be served with a summons; or

(4) That he contracted the debt or incurred the obligation in conducting the business of a ship, steamboat or other watercraft in some of the navigable waters of this state; or

(5) That he has property or rights in action which he conceals, and unjustly refuses to apply to the payment of his debts; or

(6) That he has assigned or disposed of, or is about to assign or dispose of, his property or rights in action, or some part thereof, with the intent to defraud his creditors; or

(7) That he has converted, or is about to convert, his property into money or evidences of debt, with intent to place it beyond the reach of his creditors; or

(8) That he fraudulently contracted the debt or incurred the obligation for which suit has been or is about to be brought; or

(9) That he is buying, selling, or dealing in, or has, within six (6) months next before the suing out of the attachment, directly or indirectly bought, sold, or dealt in future contracts, commonly called "futures"; or

(10) That he is in default for public money, due from him as a principal, to the state, or some county, city, town, or village thereof; or

(11) That defendant is a banker, banking company or corporation, and received deposits of money knowing at the time he or it was insolvent; or has made or published a false or fraudulent statement as to his or its financial condition; or

(12) That a judgment lien under Title 93, Mississippi Code of 1972, has been enrolled against said obligor for nonpayment of an order for support as defined by Section 93-11-101, Mississippi Code of 1972, as amended.

SOURCES: Codes, Hutchinson's 1848, ch. 56 art. 4 (6); 1857, ch. 52, art. 2; 1871, §§ 1420 et seq.; 1880, § 2413; 1892, § 129; Laws, 1906, § 133; Hemingway's 1917, § 125; Laws, 1930, § 123; Laws, 1942, § 2679; Laws, 1997, ch. 588, § 132, eff from and after July 1, 1997.

Cross References — Remedial writs grantable by supreme and circuit judges and chancellors, see § 9-1-19.

Powers of county judge to issue writs, see § 9-9-23.

Creditors attacking fraudulent conveyances, see § 11-5-75.

Fraudulent conveyances, see § 15-3-3.

Removals of public officers generally, see §§ 25-5-1 et seq.

Rights of creditors in cases of assignment for the benefit of creditors, see §§ 85-1-11 et seq.

Disposal of exempt property, see § 85-3-49.

Dealing in futures, see §§ 87-1-31, 87-1-33.

Enforceable and unenforceable future contracts, see §§ 87-1-9 to 87-1-27.

Receiving deposits when bank is insolvent, see § 97-19-47.

Penalty for receiving deposits when bank is insolvent, see § 97-19-47.

Seizure of person or property, see Miss. R. Civ. P. 64.

JUDICIAL DECISIONS

1. Affidavit generally.
2. —Where, and before whom, made.
3. —By agent.
4. —Failure to sign.
5. —Amendability.
6. Transfers while insolvent.
7. Defendant a foreign corporation, or nonresident.
8. Removal, or impending removal of property from state.
9. Concealment of property.
10. Assignment or disposal of property with intent to defraud creditors.
11. Fraudulently contracted debt for which suit is about to be brought.
12. Dealing in futures.
13. Miscellaneous.

1. Affidavit generally.

But an affidavit which stated the second ground for attachment in the disjunctive in the language of the statute, was not defective. *Helton v. McLeod & Dantzer*, 93 Miss. 516, 46 So. 534 (1908).

Whether a paper, in form of an affidavit, is really one is not determinable by what either of the parties considered in reference to it, but by the inquiry whether anything was done which could properly be construed as taking or administering an oath. *Carlisle v. Gunn*, 68 Miss. 243, 8 So. 743 (1891).

It is erroneous to state several causes for attachment in the affidavit disjunctively. *Bishop Bros. v. Fennerty*, 46 Miss. 570 (1872).

An affidavit which recites the reasons of affiant's belief of the existence of the grounds of attachment is not because of the recitals invalid. *Spear v. King*, 14 Miss. (6 S. & M.) 276 (1846).

It is unnecessary for the affidavit to be in the exact language of the statute; substantial compliance is sufficient. *Wallis v. Wallace*, 7 Miss. (6 Howard) 254 (1842).

2. —Where, and before whom, made.

The clerk of the circuit court of one county is authorized under this section [Code 1942, § 2679], and § 134, Code 1906, to take affidavit, approve bond, and issue a writ in attachment, returnable to the circuit court of another county. *Meridian Fertilizer Factory v. Edwards*, 77 Miss. 697, 27 So. 645 (1900).

An affidavit made before, and a writ issued by one who, though ineligible to an appointment as deputy because of minority, acts as deputy circuit clerk and is generally recognized by the public as such, is not void, he being a de facto officer. *Wimberly v. Boland*, 72 Miss. 241, 16 So. 905 (1895).

The affidavit may be made in another state and before a commissioner for this state; the statute does not require that the writ of attachment shall be issued by the officer before whom the affidavit is made. *Griffing v. Mills*, 40 Miss. 611 (1866).

3. —By agent.

It is unnecessary for the agent who makes the affidavit to affirm therein that he is agent; the certificate of the officer to that effect is sufficient evidence of the fact. *Lindner v. Aaron & Nelson*, 6 Miss. (5 Howard) 581 (1841).

4. —Failure to sign.

A creditor asked a justice of the peace to prepare papers for an attachment against his debtor, telling him the amount of the debt and the grounds of attachment; the justice wrote an affidavit, bond, and writ, and handed them to him, asking "If that was all right," and the creditor answered that it was. The affidavit was not signed, and the oath was not administered or attempted to be administered. Held: There was no affidavit, and the levy based thereon was invalid, and a subsequent amendment could not validate the proceedings so as to affect intervening rights.

Carlisle v. Gunn, 68 Miss. 243, 8 So. 743 (1891).

The affidavit is not invalid because not signed by the affiant. Redus v. Wofford, 12 Miss. (4 S. & M.) 579 (1845).

5. —Amendability.

Affidavit for attachment may be amended on motion to quash writ. Greenwood Grocery Co. v. Bennett, 101 Miss. 573, 58 So. 482 (1911), suggestion of error overruled, 101 Miss. 583, 58 So. 598 (1912); McSwain v. Cephus, 109 Miss. 368, 69 So. 178 (1915).

The trial court may permit an amendment so as to allege fully the grounds for attachment, which were only alleged in part in the original affidavit. Helton v. McLeod & Dantzler, 93 Miss. 516, 46 So. 534 (1908).

Where the affidavit and writ allege a debt due but the declaration is for a debt in part not due, plaintiff is entitled to amend the affidavit and writ by inserting the amount not due and dismissing as to the part due, the ground of attachment being applicable to either. Dalsheimer v. McDaniel, 69 Miss. 339, 12 So. 338 (1891); Weissinger v. Studebaker Bros. Mfg. Co., 73 Miss. 480, 18 So. 915 (1895).

6. Transfers while insolvent.

The insolvent debtor, just as the solvent debtor, may honestly prosecute his business in the usual and ordinary methods, and is open to attachment only when his conduct makes him subject thereto on some one or more of the specific grounds enumerated in the statute. Weissinger v. Studebaker Bros. Mfg. Co., 73 Miss. 480, 18 So. 915 (1895).

This provision does not preclude a debtor in insolvent or failing circumstances from giving a preference to one or more of his creditors if it be bona fide and with no intent to secure a benefit for himself. Fitzpatrick v. Flannagan, 106 U.S. 648, 1 S. Ct. 369, 27 L. Ed. 211 (1882).

7. Defendant a foreign corporation, or nonresident.

Evidence, including a showing that defendant had been in and out of the state since 1951, had moved his wife and family to Colorado, and purchased a home in that

state, and had told a number of persons that he intended to move to Colorado, was sufficient to justify a finding that defendant was either a nonresident or was about to remove himself or his property out of the state. Dickson v. Lindsay, 234 Miss. 684, 107 So. 2d 732 (1958).

A nonresident creditor may maintain attachment within the state against nonresident debtor. Hunt v. Gardner, 147 Miss. 374, 112 So. 7 (1927).

The fact that a citizen of the state moves his wife and children out of the state, together with certain exempt property, but himself remains in the state with no intention of abandoning his residence here, does not constitute him a nonresident. Carr-Lowry Lumber Co. v. Martin, 144 Miss. 106, 109 So. 849 (1926).

A nonresident creditor may attach a debt, due by a nonresident of this state to a person in this state, in another state, although the debt is payable in Mississippi, where garnishment is authorized upon attachment proceedings is such foreign state, and the debtor resides in such state and is served with process under the laws of such state. McPherson v. Matthews, 143 Miss. 299, 108 So. 494 (1926).

One indebted to a nonresident cannot place money on deposit in a bank in defiance of his creditor's wishes, for the purpose of conferring jurisdiction in attachment upon the court where the bank is located. Saxony Mills v. Wagner & Co., 94 Miss. 233, 47 So. 899, 136 Am. St. R. 575, 19 Am. Ann. Cas. 199 (1909).

A person is a nonresident if he is out of the state and intends to remain out of it for an indefinite period, although he may make temporary visits here and may intend to permanently return at some uncertain future time. Imperial Cotton Oil Co. v. Allen, 83 Miss. 27, 35 So. 216 (1903).

A creditor of a nonresident corporation which has been consolidated into a new nonresident one may attach the new corporation at law and garnish a debt to the old company which has been transferred to the new one. Morrison v. American Snuff Co., 79 Miss. 330, 30 So. 723, 89 Am. St. R. 598 (1901).

Since to authorize an attachment on the ground of nonresidence the debt must be

due, a plea in abatement that it was not due when suit was begun, is sufficient. *Stadler v. Jacobs*, 70 Miss. 429, 12 So. 444 (1893).

One residing here, though having a domicile in another state, is not liable to attachment as a nonresident. *Brown v. Crane*, 69 Miss. 678, 13 So. 855 (1892).

The test of one's nonresidence is whether the absence is of such character and so prolonged that he cannot be served with ordinary process. *Morgan v. Nunes*, 54 Miss. 308 (1877).

Domicil and residence are not convertible terms, and one having a domicile in this state may yet be a nonresident in the meaning of the law. *Alston v. Newcomer & Kausler*, 42 Miss. 186 (1868).

8. Removal, or impending removal of property from state.

Ordinary business or pleasure trips outside of the state by a resident domiciled in the state, openly made, are not within the contemplation of the statute as grounds for attachment. *Shelton v. Kindred*, 279 So. 2d 642 (Miss. 1973).

The mere fact that a professional interstate truckdriver had accepted employment with a firm of interstate haulers based outside of Mississippi and that he would be required by his employment to travel about the country, without more, was wholly insufficient to justify the seizure of his property by attachment. *Shelton v. Kindred*, 279 So. 2d 642 (Miss. 1973).

Evidence, including a showing that defendant had been in and out of the state since 1951, had moved his wife and family to Colorado, and purchased a home in that state, and had told a number of persons that he intended to move to Colorado, was sufficient to justify a finding that defendant was either a nonresident or was about to remove himself or his property out of the state. *Dickson v. Lindsay*, 234 Miss. 684, 107 So. 2d 732 (1958).

A citizen may remove exempt property out of the state or dispose of it without subjecting himself to attachment. *Carr-Lowry Lumber Co. v. Martin*, 144 Miss. 106, 109 So. 849 (1926).

Under paragraph 2, 1906 Code, § 133, a defendant has removed himself out of this state and is therefore liable to an attach-

ment for debt when he is absent from the state with no definite intention of returning thereto. *AMOCO v. H. Booth Lumber Co.*, 137 Miss. 404, 102 So. 262 (1924).

Where an attachment is sued out against a nonresident of this state, and no personal summons is served on such nonresident or his agent, but publication is depended upon for service, a judgment cannot be rendered at the return term, and if one is entered it is void and will be reversed upon appeal. *Copiah Hdwe. Co. v. Meteor Motor Car Co.*, 136 Miss. 274, 101 So. 375 (1924), error overruled, 136 Miss. 284, 101 So. 579 (1924).

Mere absence from the state, coupled with the fact that the creditor does not know where the defendant is, does not authorize attachment against the defendant, if process may be served under the provisions of Code 1906 § 3926. To authorize attachment because of removal from the state, or absence from domicile, there must be an inability to serve the summons in the manner provided by law to obtain the jurisdiction of the person, and the burden of proof is on the attaching creditor to show this. *Collier v. Chamblee*, 136 Miss. 257, 101 So. 372 (1924); *Dent v. Jones & Pintard*, 50 Miss. 265 (1874); *Morgan v. Nunes*, 54 Miss. 308 (1877); *Bowers v. Ross*, 55 Miss. 213 (1877).

Evidence held insufficient to show that a merchant was about "to remove himself or his property out of this state." *Bamberger v. Merchants' & Farmers' Bank*, 73 Miss. 572, 19 So. 296 (1896).

A debtor going from this state expecting to return and leaving sufficient property accessible to creditors to pay his debts, may take money with him without subjecting himself to attachment. *Philadelphia Inv. Co. v. Bowling*, 72 Miss. 565, 17 So. 231 (1895).

But if his sole property in this state consists of money and he takes it with him, though expecting to return, he may be attached, as money is subject to execution or attachment under § 3968 Code 1906. *Philadelphia Inv. Co. v. Bowling*, 72 Miss. 565, 17 So. 231 (1895).

The shipment by an insolvent debtor of cotton to a commission merchant in another state, to create a fund to be drawn against in payment of such other debts as

he might elect to pay other than his debt to the assignee, is a removal of property out of the state within the meaning of the statute. *Crow v. Lemon & Gale Co.*, 69 Miss. 799, 11 So. 110 (1892).

Under the statute subjecting to attachment one who "has removed or is about to remove his property out of the state," a merchant though insolvent who ships cotton to his commission merchant in another state, for sale to pay a debt exceeding the value of the cotton, is not liable to attachment. *Lowenstein v. Bew*, 68 Miss. 265, 8 So. 674 (1891).

To sustain an attachment on the ground that the debtor has removed, or is about to remove, his property out of the state, it is sufficient for the plaintiff to show that the defendant has removed, or is about to remove, any of his property out of the state; and then it devolves on the defendant to show, if he can, that he has other ample, visible property to satisfy all claims against him unless such facts appear from the plaintiff's evidence. *Pickard v. Samuels*, 64 Miss. 822, 2 So. 250 (1887).

If a defendant have remaining in the state, and which he is not about to remove, ample property to satisfy, and which is liable to his debts, then the mere removal of some other property from the state will not subject him to attachment. *Montague v. Gaddis*, 37 Miss. 453 (1859); *Pickard v. Samuels*, 64 Miss. 822, 2 So. 250 (1887).

9. Concealment of property.

There must be both concealment and unjust refusal to apply to debts to justify attachment. *Crooke v. Deas & Duke*, 146 Miss. 260, 111 So. 293 (1927).

Concealment of property is ground for attachment, regardless of whether successful. *Gray v. Valley*, 136 Miss. 886, 101 So. 855 (1924).

In attachment, evidence of bank deposits in assumed name sufficient for submission to jury of question of whether defendant had property which he had concealed and unjustly refused to apply to payment of debts. *Gray v. Valley*, 136 Miss. 886, 101 So. 855 (1924).

A judgment on an attachment writ reciting that defendant unjustly refused to apply his property to the payment of his debts, is not invalid because of a variance

between it and the affidavit, which alleged that defendant had property which he concealed and unjustly refused to apply to the payment of his debts. *Brown v. Williams-Brooke Co.*, 106 Miss. 187, 63 So. 351 (1913).

Where an affidavit in attachment assigned as a ground that defendant had property or rights of action which he concealed or refused to apply on his debts, and the testimony shows that he had an office in the county where suit was brought, and had property there and spent a large part of his time in said county, the court should have granted a peremptory instruction for defendant. *Smith v. Corporation of Oxford*, 91 Miss. 651, 45 So. 365 (1908).

10. Assignment or disposal of property with intent to defraud creditors.

A writ of attachment on the ground that defendant had assigned or disposed of his property or is about to assign or dispose of his property or rights in action, with intent to defraud his creditors, was not sustained by the evidence tending to show that the defendant was running a saw-mill, and that he shipped his lumber out of the state, and that he owed plaintiff, but had not paid him, and defendant was entitled to a verdict on the attachment issue. *Terry v. Jolly*, 115 Miss. 26, 75 So. 756 (1917).

Certain evidence held admissible on the question of genuineness of a debt preferred in an alleged fraudulent assignment. *English v. Friedman*, 70 Miss. 457, 12 So. 252 (1893).

To sustain an attachment on the ground of the fraudulent disposition of property, the plaintiff may rest on evidence which shows such disposition, in case the defendant owns no other property; the ownership of other and (ample) property, liable to his debts, must be shown by defendant, unless it appear from the plaintiff's evidence. *Pickard v. Samuels*, 64 Miss. 822, 2 So. 250 (1887).

If the purpose to remove exist, and may be carried out in one, two, three, or several weeks or months, though the debtor's movements be not characterized by fright, speed, or haste, he is liable to attachment, if the object be to defeat, defraud or delay

creditors. *Myers v. Farrell*, 47 Miss. 281 (1872).

11. Fraudulently contracted debt for which suit is about to be brought.

Where defendant traded to the plaintiff two automobiles he knew to be stolen property and also by bill of sale the defendant expressly warranted the title to the property, and the automobiles, so traded to plaintiffs, were repossessed by the original owners, the obligation was fraudulently contracted and furnished sufficient ground for attachment of defendant's property. *Davis v. Shemper*, 210 Miss. 201, 49 So. 2d 253 (1950), error overruled, 210 Miss. 208, 50 So. 2d 143 (1951).

Intent to defraud must exist when debt is created for attachment on such ground. *Crooke v. Deas & Duke*, 146 Miss. 260, 111 So. 293 (1927).

A false warranty, knowingly made, is evidence of a fraudulent contraction of the debt. *Hambrick v. Wilkins*, 65 Miss. 18, 3 So. 67, 7 Am. St. R. 631 (1887).

Although the defendant commit a felony in contracting the debt sued for, to sustain the attachment it must be shown that in so doing he intended to defraud the plaintiff. The statute defining the felony in this case was intended for the protection of the public. *Hughes v. Lake*, 63 Miss. 552 (1886).

A purpose to defraud at the time is necessary in order to constitute the fraudulent contraction of the debt. *Marqueze v. Sontheimer*, 59 Miss. 430 (1882).

12. Dealing in futures.

Where defendant made two purchases of "futures" for an undisclosed principal, one with his principal's money and one with his own, plaintiff was entitled to a peremptory instruction that the attachment was rightfully sued out. *Dillard v. Brenner*, 73 Miss. 130, 18 So. 933 (1895).

13. Miscellaneous.

Where, as to a writ of garnishment issued to nonresident express company doing business in the state, the garnishee had the right to raise legal question as to jurisdiction of the court and also the reasonableness of its refusal to answer certain questions, the action of the trial court

in striking out the answer of the garnishee and rendering judgment against him without first ordering a hearing, and ordering the garnishee to answer the questions and then to give it ample time within which to do so, was reversible error. *Keathley v. Hancock*, 212 Miss. 1, 53 So. 2d 29 (1951).

Where buyer of fishing equipment, resident of Mississippi, leased equipment to Louisiana fishermen, buyer could not enjoin unpaid seller in Mississippi from prosecuting attachment suit in Louisiana, notwithstanding Louisiana procedure might deprive buyer of exemption, since buyer, by consummating removal of equipment to Louisiana, deprived seller of right to seize equipment in Mississippi under purchase-money statute or on ground of imminent removal from State. *E.J. Platte Fisheries v. Wadford*, 170 Miss. 617, 155 So. 161 (1934).

Grounds of attachment authorized by statute must be proven. *Crooke v. Deas & Duke*, 146 Miss. 260, 111 So. 293 (1927).

Instruction in attachment suit that "if plaintiff has failed to prove any of said grounds," it is the duty of the jury to find for defendant, the word "any" is synonymous with "either". *Carr-Lowry Lumber Co. v. Martin*, 144 Miss. 106, 109 So. 849 (1926).

Where the evidence wholly fails to sustain any one of the grounds of attachment, it is error to refuse a peremptory instruction for defendant. *Pinola Lumber Co. v. Husbands*, 118 Miss. 229, 79 So. 69 (1918).

Declaration can be amended so as to increase the amount of indebtedness claimed after trial of the attachment issue. *Anderson v. Dever*, 109 Miss. 235, 68 So. 166 (1915).

Although for want of a plea in abatement judgment is rendered for plaintiff on the attachment, yet if the issue as to indebtedness is decided for defendant, this is conclusive evidence that the attachment was wrongfully sued out and defendant has a right of action for damages on the attachment bond. *Buckly v. Van Diver*, 70 Miss. 622, 12 So. 905 (1893).

Unless the question is one of defendant's estoppel to deny the ground of the attachment, plaintiff's belief, though induced by the conduct and language of the

defendant as to the defendant's solvency, or the truth of the grounds of attachment, is immaterial. *Stadder v. Jacobs*, 70 Miss. 429, 12 So. 444 (1893).

Where cause for attachment is shown

for only a part of the debt, and the court has no jurisdiction of so small an amount as that part, the whole attachment must fail. *Delmas Bros. v. Morrison*, 61 Miss. 314 (1883).

RESEARCH REFERENCES

ALR. Sufficiency of affidavit for attachment, respecting fraud or intent to defraud, as against objection that it is a mere legal conclusion. 8 A.L.R.2d 578.

Am Jur. 6 Am. Jur. 2d, Attachment and Garnishment §§ 217, 223, 255, 226 et seq.

CJS. 7 C.J.S., Attachment §§ 72 et seq., 101.

§ 11-33-11. Bond.

The creditor, his agent, or attorney, shall also give bond, with a sufficient surety or sureties, to be approved by the officer issuing the attachment, in double the sum for which the complaint is made payable to the defendant and conditioned to the effect following, to wit:

"The condition of the above obligation is that, whereas, the above bound _____ prays an attachment against the estate of The said _____ for the sum of _____ dollars, returnable to the _____ court of _____, on the _____ day of _____ next:

"Now, if the plaintiff shall pay to the defendant all such damages as he shall sustain by the wrongful suing out of the attachment, and all costs which may be awarded against the plaintiff in said suit, then the obligation shall be void."

The bond, together with the affidavit for the attachment, shall be returned by the officer taking the same to the court to which the attachment is returnable.

SOURCES: Codes, *Hutchinson's* 1848, ch. 56, art. 4 (8, 14); 1857, ch. 52, art. 6; 1871, § 1425; 1880, § 2416; 1892, § 130; Laws, 1906, § 134; *Hemingway's* 1917, § 126; Laws, 1930, § 124; Laws, 1942, § 2680.

Cross References — Posting bond before attachment of perishable commodities, see § 11-1-43.

Seizure of person or property, see Miss. R. Civ. P. 64.

JUDICIAL DECISIONS

1. In general.
2. Sufficiency of bond.
3. Damages recoverable.

1. In general.

State statute authorizing pre-judgment ex parte attachment of realty, without bond and absent exigent circumstances, violated due process clause, as applied, since (1) property interests affected were

significant, (2) risk of erroneous deprivation of due process was substantial, (3) post-deprivation safeguards did not adequately reduce risk of such error, (4) interests in favor of ex parte attachment were too minimal to obviate need for pre-deprivation hearing, (5) state's substantive interest in protecting rights of plaintiff could not be more weighty than plaintiff's interest, (6) remedy of attachment histor-

ically was predicated on some circumstances not here present, and (7) only Connecticut allowed such procedure. *Connecticut v. Doeher*, 501 U.S. 1, 111 S. Ct. 2105, 115 L. Ed. 2d 1 (1991).

The state has the right to file an action for the collection of unpaid privilege taxes and penalties thereon due the state and its political subdivisions by the use of the statutory remedy of an attachment at law without the giving of an attachment bond provided for by this section. *Winter v. Brooks*, 232 Miss. 742, 100 So. 2d 362 (1958).

Execution and approval of bond are essential to a valid attachment in the Circuit Court. *Williams v. Thigpen*, 217 Miss. 683, 64 So. 2d 765 (1953).

Only liability of attaching creditors and sureties on attachment bond was for wrongful suing out of attachment and alone to defendant therein. *Jamison v. Wilson*, 152 Miss. 382, 119 So. 800 (1928).

A judgment rendered by a justice of the peace on a bond is divisible, and when appellant dismisses his case against the surety, a perfectly valid judgment still remains against the principal. *Ott v. McElveen*, 102 Miss. 139, 58 So. 709 (1912).

The clerk of the circuit court of one county is authorized under this section [Code 1942, § 2680], and Code 1906, §§ 133, 134, to take affidavit, approve bond, and issue a writ in attachment, returnable to the circuit court of another county. *Meridian Fertilizer Factory v. Edwards*, 77 Miss. 697, 27 So. 645 (1900).

If defendant prevails on the debt issue, it is conclusive evidence that the attachment was wrongfully sued out, although for want of a plea in abatement judgment had been entered for plaintiff on the attachment, and defendant has a right of action for damages on the attachment bond. *Buckly v. Van Diver*, 70 Miss. 622, 12 So. 905 (1893).

2. Sufficiency of bond.

In case of the execution of bond by the

officers of a corporation for their company, the presumption is that the instrument has been rightly executed. *Saunders v. Columbus Life & Gen. Ins. Co.*, 43 Miss. 583 (1870).

A bond executed by the usee in the suit is good. *Grand Gulf R.R. & Banking Co. v. Conger*, 17 Miss. (9 S. & M.) 505 (1848).

A bond executed by an agent, binding himself personally and not his principal, is sufficient. *Frost v. Cook*, 8 Miss. (7 Howard) 357 (1843); *Page v. Ford*, 10 Miss. (2 S. & M.) 266 (1844).

A bond signed by one partner, who acts for himself and as agent for his partners in suing out the attachment is sufficient, though not signed by the other members of the firm. *Wallis v. Wallace*, 7 Miss. (6 Howard) 254 (1842).

3. Damages recoverable.

In such case, as defeating the debt also defeats the attachment, attorney's fees are allowable. *Buckly v. Van Diver*, 70 Miss. 622, 12 So. 905 (1893).

Actual damages are recoverable on an attachment bond, and counsel fees are embraced. *Buckly v. Van Diver*, 70 Miss. 622, 12 So. 905 (1893).

Where no property of defendant was attached, but judgment nil dicit was rendered against him on the attachment, he cannot, upon defeating plaintiff on the issue of indebtedness, recover on the attachment bond for attorneys' fees and expenses incurred in defense of the action of assumpsit against him. *Buckly v. Van Diver*, 70 Miss. 622, 12 So. 905 (1893).

Where attachment proceedings, though based upon an affidavit and bond appropriate to a distress for rent, proceed thereafter, and are treated by both parties as an ordinary attachment, and the landlord fails in such attachment, the tenant, although not entitled to double damages, may recover on the bond for actual damages. *Hawkins v. James*, 69 Miss. 361, 11 So. 654 (1892).

RESEARCH REFERENCES

Am Jur. 6 Am. Jur. 2d, Attachment and Garnishment §§ 530-532 et seq.

Bonds, 2 Am. Jur. Pl & Pr Forms (Rev), Attachment and Garnishment, Forms 351 et seq.

CJS. 7 C.J.S., Attachment §§ 116 et seq.

§ 11-33-13. Bond by an agent.

If the bond purport to be executed by an agent or attorney of the attaching creditor, it shall be prima facie evidence that the agent or attorney had due authority to act.

SOURCES: Codes, 1871, § 1426; 1880, § 2417; 1892, § 131; Laws, 1906, § 135; Hemingway's 1917, § 127; Laws, 1930, § 125; Laws, 1942, § 2681.

Cross References — Seizure of person or property, see Miss. R. Civ. P. 64.

§ 11-33-15. Bond excepted to: new bond and affidavit.

When it shall appear to the court, on exceptions taken by the defendant or otherwise, that the sureties on any attachment bond are insufficient, the court shall direct the plaintiff to give a new bond with sufficient surety; and such bond shall be as valid, in all respects, as the original bond. If the plaintiff fail to give a new bond within the time required by the court, the attachment shall be dismissed. In all cases where an attachment bond or affidavit may be defective in any respect, or may be lost or destroyed, the plaintiff shall be allowed to file a new affidavit and bond, which shall be, in all respects, as valid and binding as if given at the commencement of the suit.

SOURCES: Codes, 1857, ch. 52, art. 15; 1871, § 1483; 1880, § 2464; 1892, § 132; Laws, 1906, § 136; Hemingway's 1917, § 128; Laws, 1930, § 126; Laws, 1942, § 2682.

Cross References — Seizure of person or property, see Miss. R. Civ. P. 64.

JUDICIAL DECISIONS

1. In general.

Where the affidavit and writ alleged a debt due, but the declaration was for a debt in part not due, plaintiff was entitled to amend the affidavit and writ by inserting the amount not due and dismissing as to the part due, the grounds of attachment being applicable to either. *Dalsheimer v. McDaniel*, 69 Miss. 339, 12 So. 338 (1891); *Weissinger v. Studebaker Bros. Mfg. Co.*, 73 Miss. 480, 18 So. 915 (1895).

Leave to amend the affidavit and writ so as to show a debt not due is properly denied, and a motion to quash properly

sustained, where the attachment was for a debt past due and issued in one county returnable before the circuit court of another, and it does not appear that defendant resided or last resided, or that his property was found in the former county, and the declaration shows that the only part of the debt past due when the attachment was issued, was below the jurisdiction of the circuit court. *Yale v. McDaniel*, 69 Miss. 337, 12 So. 556 (1891).

An attachment proceeding will not be quashed, where an application is made to amend the affidavit, because neither the

officer nor the affiant signed the affidavit; it being shown that the affidavit was in fact sworn to, and both parties thought everything necessary to be done had been done, and their failure to sign was by mere inadvertence; and this too, even though the affiant did not "hold up his hand and swear." (The report of this case omits to state, what is shown by the record, that an application to amend was made.) *Dunlap v. Clay*, 65 Miss. 454, 4 So. 118 (1888).

A bond signed by sureties in a partnership name may be amended by allowing each partner to sign his own name. *Boisseau & Martinez v. Kahn*, 62 Miss. 757 (1885).

The jurat to an affidavit may be amended by allowing the officer to subscribe his name to it. *Boisseau & Martinez v. Kahn*, 62 Miss. 757 (1885).

A bond executed by a single surety, who was incapacitated to become such, is amendable. *Field, Morris & Fenner v. McKinney*, 60 Miss. 763 (1883).

Under this provision, which expressly authorizes amendments, a defective affidavit for attachment may be amended by adding a new ground for the attachment. *Fitzpatrick v. Flannagan*, 106 U.S. 648, 1 S. Ct. 369, 27 L. Ed. 211 (1882).

Mere irregularities in the bond must be availed of by exceptions taken by the defendant; a claimant, or the surety on his bond, cannot object to the attachment proceedings on account thereof. *Atkinson v. Foxworth*, 53 Miss. 741 (1876).

The amendment of an affidavit in attachment does not affect the lien of the writ. *Griffing v. Mills*, 40 Miss. 611 (1866).

RESEARCH REFERENCES

Am Jur. 6 Am. Jur. 2d, Attachment and Garnishment §§ 442 et seq.

CJS. 7 C.J.S., Attachment §§ 116 et seq.

§ 11-33-17. The writ.

On affidavit being made and bond given, the officer approving the bond shall issue one or more writs of attachment against the estate of the debtor, directed to the sheriff, or any other proper officer of the county or counties in which the defendant shall have property or debts, and shall be returnable to the next term of the circuit court of any county, or to the justice court of any county, in cases within the jurisdiction of the justice court, in which the defendant or property or debts of the defendant may be found and shall be the leading process of the suit.

SOURCES: Codes, 1857, ch. 52, art. 3; 1871, § 1428; 1880, § 2418; 1892, § 133; Laws, 1906, § 137; Hemingway's 1917, § 129; Laws, 1930, § 127; Laws, 1942, § 2683; Laws, 1981, ch. 471, § 34; Laws, 1982, ch. 423, § 28.

Cross References — Money paid into the justice court clerk clearing account, see § 9-11-18.

Form of writ, see § 11-33-19.

Seizure of person or property, see Miss. R. Civ. P. 64.

JUDICIAL DECISIONS

1. In general.

The fact that an attachment bond was not marked approved by circuit clerk until day after affidavit and attachment was made and writ was issued and levied was

not sufficient to justify the quashing of the attachment, where the bond met with clerk's approval as good and sufficient and he called it to the attention of the sheriff as affording protection to him in the exe-

cution of writ then delivered to the executing officer. *Small v. Sturgis Lumber Co.*, 216 Miss. 515, 62 So. 2d 765 (1953).

Code 1906 §§ 3079, 3080, so far as applicable, may be used by the claimant of property, where the contest is between him and the seller thereof, the same as if suit arose in attachment. *Quillin v. Paine*, 94 Miss. 696, 47 So. 898 (1909).

The clerk of the circuit court of one county is authorized under this section [Code 1942, § 2683], to take affidavit, approve bond, and issue a writ in attachment, returnable to the circuit court of another county. *Meridian Fertilizer Factory v. Edwards*, 77 Miss. 697, 27 So. 645 (1900).

A justice cannot specially deputize a private person to execute a writ of attachment in another county. *Miller v. Edwards*, 75 Miss. 739, 23 So. 426 (1898).

An attachment suit by consent of parties may be transferred by change of venue from the circuit court of one county to that of another. *Weissinger v. Mansur & Tibbetts Implement Co.*, 75 Miss. 64, 21 So. 757 (1897).

Where there is no levy upon property or garnishment in the county where the action is brought, although an alias writ of attachment has been served as a summons upon defendant in another county where he resides, the court is without jurisdiction. *Campbell v. Triplett*, 74 Miss. 365, 20 So. 844 (1896).

The venue of actions in personam is "in the county in which the defendant or any of them may be found." *Campbell v. Triplett*, 74 Miss. 365, 20 So. 844 (1896).

A writ of attachment issued by one as deputy, who though by reason of minority is ineligible to appointment, acts as deputy and is generally recognized by the public as such, is not void as he is a de facto officer. *Wimberly v. Boland*, 72 Miss. 241, 16 So. 905 (1895).

Where a deputy clerk issues an attachment in the name of the clerk without affixing his name as deputy, the writ is not void. At most, this is only an irregularity and is amendable. *Wimberly v. Boland*, 72 Miss. 241, 16 So. 905 (1895).

Where a writ of attachment, issued by a justice of the peace in one district, is returnable to a justice's court to be held at a designated place in another district, and the parties appear at the place to which the writ is returnable, and try the case before a justice of the peace other than the one who issued the writ, the judgment is valid; and on appeal to the circuit court in such case, the certificate of the justice who tried the case that the affidavit and bond are a part of the record in the case in his court, obviates all objections to them on the ground that they were not executed before him. *Armitage v. Rector, Ratliff & Co.*, 62 Miss. 600 (1885).

The proper court of the county of a garnishee's residence has jurisdiction of an attachment against a defendant to whom he is indebted, although the defendant be a householder and resident of another county. *Barnett v. Ring*, 55 Miss. 97 (1877); *Smith v. Mulhern*, 57 Miss. 591 (1880); *Baum v. Burnes*, 66 Miss. 124, 5 So. 697 (1888).

RESEARCH REFERENCES

Am Jur. 6 Am. Jur. 2d, Attachment and Garnishment §§ 305-315, 347 et seq.

Writ, warrant, or order of attachment, 2 Am. Jur. Pl and Pr Forms (Rev ed), At-

tachment and Garnishment, Forms 31 et seq.

CJS. 7 C.J.S., Attachment §§ 83, 115, 156-160, 194, 195.

§ 11-33-19. Form of the writ.

The writ shall be in the form or to the effect following, to wit:

"THE STATE OF MISSISSIPPI

"To the sheriff or any constable of _____ county, greeting:

"Whereas, AB (or agent or attorney of AB) hath complained on oath to _____ one of the judges of the Supreme Court (or other officer as the case

may be) that CD is justly indebted to the said AB to the amount of _____ and that the said CD is a nonresident, etc. (reciting the affidavit) and bond and security having been given according to the statute:

"We therefore command you that you attach the said CD by his estate, real and personal, in your county to the value of the said demand and costs of suit, and that you safely keep the same according to law, so as to compel the said CD to appear before the _____ court (or before the court of _____, a justice court judge of _____ county), to be held at _____, in and for the county of _____, on the _____ Monday of _____, to answer the above complaint. And that you summon the said CD, if to be found in your county, to appear and answer accordingly; and have there then this writ, with your proceedings thereon.

"Witness my hand, this _____ day of _____, A.D. _____."

The writ shall be signed by the officer granting the same or, if issued by a clerk or his deputy, shall be dated, signed and sealed as other writs; and an attachment shall not be quashed or abated for want of form if the substantial matters expressed in the foregoing precedent be contained therein; and on the demand of the plaintiff said writ may embody a garnishment.

SOURCES: Codes, 1857, ch. 52, art. 6; 1871, § 1429; 1880, § 2419; 1892, § 134; Laws, 1906, § 138; Hemingway's 1917, § 130; Laws, 1930, § 128; Laws, 1942, § 2684; Laws, 1981, ch. 471, § 35; Laws, 1982, ch. 423, § 28; Laws, 1986, ch. 459, § 24, eff from and after July 1, 1986.

Cross References — Writ, generally, see § 11-33-17.
Seizure of person or property, see Miss. R. Civ. P. 64.

JUDICIAL DECISIONS

1. In general.

Where plaintiff sues out attachment against defendant and suggests that A has property in his possession belonging to defendant, and A answers that he has no control over the property and does not know whether it belongs to defendant, but that it is in a building which he leased defendant, whereupon an order is made that A surrender the property to the sheriff this is not a garnishment, and does not bar the rightful owner of the right to assert her title thereto. *Minshew v. Geo. W. Davidson & Co.*, 86 Miss. 354, 38 So. 315 (1905).

The fact that a writ of attachment ad-

ressed to any officer of the county in which the writ was issued was served in another county by an officer of that county, to which officer it was not addressed, does not affect the validity of the service. *Hawkins & Co. v. McAlister*, 86 Miss. 84, 38 So. 225 (1905).

Under this section [Code 1892, § 134] and the section following [Code 1892, § 135], officers issuing attachments may embody a writ of garnishment therein and may issue duplicate and alias writs of attachment and garnishment. *C.C. Kelly Banking Co. v. Hollingsworth*, 71 Miss. 141, 13 So. 932 (1893).

RESEARCH REFERENCES

Am Jur. 6 Am. Jur. 2d, Attachment and Garnishment §§ 307, 310, 311, 319 et seq.

State and federal forms, 2 Am. Jur. Pl & Pr Forms (Rev), Attachment and Garnishment, Forms 87, 88.

2 Am. Jur. Pl & Pr Forms (Rev), Attachment And Garnishment, Form 87, 88.

CJS. 7 C.J.S., Attachment §§ 161 et seq.

§ 11-33-21. Duplicate and alias writs.

The officer granting an attachment may issue duplicate writs to any other county in which the defendant may have property or debts due him, which writs shall be returnable to the court to which the original is returnable, and shall be executed and returned in like manner. Where the attachment has not been executed, or where no property has been found, or not sufficient to satisfy the debt, or where the plaintiff desires to garnish other persons, the clerk of the court to which same is returnable may issue alias writs to the same or other counties without a renewal bond or affidavit.

SOURCES: Codes, 1857, ch. 52, art. 16; 1871, § 1432; 1880, § 2421; 1892, § 135; Laws, 1906, § 139; Hemingway's 1917, § 131; Laws, 1930, § 129; Laws, 1942, § 2685.

Cross References — Alias and pluries summons and testatum writ, see § 13-3-15. Seizure of person or property, see Miss. R. Civ. P. 64.

JUDICIAL DECISIONS

1. In general.

Defects in the proceedings by which an attachment writ was sued out and served will not justify a dismissal of the suit on the debt nor deprive the plaintiff of the right to amend and sue out alias process. Foote v. John E. Hall Com. Co., 84 Miss. 445, 36 So. 533 (1904).

Under this section [Code 1892, § 135] and the section preceding [Code 1892, § 134], officers issuing attachments may embody a writ of garnishment therein and may issue duplicate and alias writs of

attachment and garnishment. C.C. Kelly Banking Co. v. Hollingsworth, 71 Miss. 141, 13 So. 932 (1893).

The service of an alias attachment writ, returnable to a court, will give the court jurisdiction. Barnett v. Ring, 55 Miss. 97 (1877).

It is not required that the duplicate writs should have indorsed thereon that they are duplicates. Saunders v. Columbus Life & Gen. Ins. Co., 43 Miss. 583 (1870).

RESEARCH REFERENCES

Am Jur. 6 Am. Jur. 2d, Attachment and Garnishment §§ 312-314.

CJS. 7 C.J.S., Attachment § 169.

§ 11-33-23. Writ to be served, on what, and what bound by the levy.

The officer receiving the writ of attachment shall forthwith levy the same, according to law, on the property of the defendant, real and personal, wherever

found; and he shall summon as garnishees, by writs of garnishment, to be issued and served by himself, and duly returned, all persons indebted to the defendant, or having in possession effects belonging to him, to appear at the court to which the attachment is returnable, there to answer as required by law; and he shall seize the books of accounts and other evidence of debt belonging to the defendant and levy on the stock, shares, or interest of the defendant in any corporation, joint-stock company, or copartnership. All the property, debts, choses in action, stock, shares, and interest of the defendant attached, shall be bound by the levy from the date thereof.

SOURCES: Codes, 1857, ch. 52, art. 4; 1871, § 1434; 1880, § 2423; 1892, § 136; Laws, 1906, § 140; Hemingway's 1917, § 132; Laws, 1930, § 130; Laws, 1942, § 2686.

Cross References — Summoning of creditor of judgment debtor in garnishment proceeding, see § 11-35-3.

When bond of indemnity is required, see § 13-3-157.

Refusal to give aid to sheriff, see § 19-25-67.

Exemption of income or principal from an employee trust plan, see § 71-1-43.

Seizure of person or property, see Miss. R. Civ. P. 64.

JUDICIAL DECISIONS

1. In general; assignment.
2. Claimant.
3. Effect of levy.
4. Garnishment.
5. Nonresident.
6. Persons entitled.

1. In general; assignment.

In case of a general assignment, where previous attachments have been levied, the property should be sold by the assignee-receiver, free from the lien of the attachments, and the proceeds applied by the court to the payment of the attaching creditors. *Weems v. Love Mfg. Co.*, 74 Miss. 831, 21 So. 915 (1897).

2. Claimant.

Code 1906 § 4990, so far as applicable, may be used by the claimant of property, where the contest is between him and the seller thereof, the same as if suit arose in attachment. *Quillin v. Paine*, 94 Miss. 696, 47 So. 898 (1909).

Personal property seized in attachment and delivered to a claimant under a forthcoming bond is no longer in custodia legis and is subject to execution or attachment by creditors of the claimant. *Hart v. Livermore Foundry & Mach. Co.*, 72 Miss. 809, 17 So. 769 (1895).

3. Effect of levy.

A levy on lands to which defendant held a bond for title after he had assigned the same to another does not bind the land although the creditor was without notice, actual or constructive, of the assignment. *MacRae v. Goodbar*, 80 Miss. 315, 31 So. 812 (1902).

Whatever may be true of the validity of the levy, a junior creditor cannot question it, unless he has procured such a levy upon the property in his own case as will give him precedence. *Scharff v. Chaffe*, 68 Miss. 641, 9 So. 897 (1891).

The seizure of the books of accounts and the choses in action creates no lien; this can be acquired only by service of notice on the garnishees. *Boone v. McIntosh*, 62 Miss. 744 (1885).

4. Garnishment.

Where a garnishee is served and fails to answer, judgment against the garnishee will depend upon the validity of the judgment against the defendant, and if such judgment is not authorized the judgment against the garnishee will be reversed on appeal. *Copiah Hdwe. Co. v. Meteor Motor Car Co.*, 136 Miss. 274, 101 So. 375 (1924), error overruled, 136 Miss. 284, 101 So. 579 (1924).

Under this section [Code 1942, § 2686], the officer receiving a writ of attachment with no suggestion contained in it of garnishment may summon as garnishees persons whose names may be suggested to him. The section supplements, but does not supersede, the power of officers under §§ 138, 139 Code 1892 to issue attachment and garnishment writs. *First Nat'l Bank v. First Nat'l Bank*, 72 Miss. 258, 16 So. 904 (1895).

Where a writ embodies a garnishment, as it may under Code 1930, § 128, but the sheriff instead of summoning the garnishees thereunder, issues and serves an independent writ of garnishment under this section, the latter writ, though unnecessary, is not invalid. *First Nat'l Bank v. First Nat'l Bank*, 72 Miss. 258, 16 So. 904 (1895).

As to garnishments, the purpose of this section [Code 1942, § 2686] was to give a supplemental writ to be issued by the officer having the original in his hands for service, for the purpose of supplying a deficiency in the original and not to take away the right of the officer issuing the attachment writ to embody garnishment writs therein. *First Nat'l Bank v. First Nat'l Bank*, 72 Miss. 258, 16 So. 904 (1895).

A suggestion in the writ that a certain person is indebted to the defendant makes it the duty of the officer to summon that person as garnishee, even though the writ contains no direct command that he do so. *Semmes v. Patterson*, 65 Miss. 6, 3 So. 35 (1887).

5. Nonresident.

By attachment of nonresident's shares in resident corporation, court acquired ju-

risdiction to render decree against nonresident condemning shares for sale to satisfy indebtedness. *Grenada Bank v. Glass*, 150 Miss. 164, 116 So. 740 (1928).

Nonresident defendant will not be heard, on his plea to the jurisdiction of the court, to allege nonownership of the property levied upon. *Weaver Grocery Co. v. Cain Milling Co.*, 117 Miss. 781, 78 So. 769 (1918).

Where in a suit in attachment and for an accounting, complainant fails to show that there was any property belonging to the defendant in the hands of the third party when the attachment was served, the court obtained no jurisdiction to entertain the suit and order an accounting. *Louis Werner Sawmill Co. v. Sheffield*, 89 Miss. 12, 42 So. 876 (1907).

6. Persons entitled.

A creditor of a nonresident corporation which has been consolidated into a new nonresident one, may attach the new corporation at law and garnish a debt to the old company which has been transferred to the new one. *Morrison v. American Snuff Co.*, 79 Miss. 330, 30 So. 723, 89 Am. St. R. 598 (1901).

A sheriff holding an attachment writ against a corporation incurs no liability to plaintiff for refusing to levy it on the property of the individuals composing it and managing its affairs. *State ex rel. Owen v. Marshall*, 69 Miss. 486, 13 So. 668 (1891).

This is true even if it can be shown that if the levy had been made the property might thereafter have been subjected in a chancery proceeding to the demand of plaintiff. *State ex rel. Owen v. Marshall*, 69 Miss. 486, 13 So. 668 (1891).

RESEARCH REFERENCES

Am Jur. 6 Am. Jur. 2d, Attachment and Garnishment §§ 319-327.

2 Am. Jur. Pl & Pr Forms (Rev), Attach-

ment And Garnishment, Forms 141 et seq.

CJS. 7 C.J.S., Attachment §§ 170 et seq.

§ 11-33-25. The defendant to be summoned.

The officer serving the attachment shall summon the defendant, if to be found, to appear and answer the action, as in other cases.

SOURCES: Codes, 1880, § 2423; 1892, § 137; Laws, 1906, § 141; Hemingway's 1917, § 133; Laws, 1930, § 131; Laws, 1942, § 2687.

Cross References — Seizure of person or property, see Miss. R. Civ. P. 64.

RESEARCH REFERENCES

Am Jur. 6 Am. Jur. 2d, Attachment and Garnishment §§ 387, 567-568.

2 Am. Jur. Pl & Pr Forms (Rev), Attachment And Garnishment, Forms 141 et seq.

§ 11-33-27. Proceeding when levy by other than sheriff.

If a writ of attachment, returnable to the circuit court, be served by a constable, marshal, or by any person specially appointed for that purpose, the writ of attachment with the return thereon of the action of such person and all property and effects levied on, shall forthwith be delivered to the sheriff of the proper county, who shall be responsible for the property so seized, and shall return the writ to the proper court, with a statement of his action under it; but if the sheriff be a party, the office serving the attachment shall make the return, and so state therein, and likewise retain the property, unless the court, or judge in vacation, make an order for the safekeeping and forthcoming thereof.

SOURCES: Codes, 1871, § 1437; 1880, § 2426; 1892, § 138; Laws, 1906, § 142; Hemingway's 1917, § 134; Laws, 1930, § 132; Laws, 1942, § 2688; Laws, 1986, ch. 459, § 25, eff from and after July 1, 1986.

Cross References — Seizure of person or property, see Miss. R. Civ. P. 64.

JUDICIAL DECISIONS

1. In general.

Where a writ of attachment is returned served by one not an officer of the court, it is error to refuse to issue an alias writ on plaintiff's request, and to dismiss the entire suit, but the attachment should be kept alive by the issuance of the alias, and if no personal service of the summons has been had, an alias summons should also be issued. *Foote v. John E. Hall Com. Co.*, 84 Miss. 445, 36 So. 533 (1904).

A circuit court has no jurisdiction of an

attachment returned by a constable where the record does not show that he ever delivered the writ to the sheriff with his return or that claimants bonded the property. *Tishomingo Sav. Inst. v. Allen*, 76 Miss. 114, 23 So. 305 (1898).

The circuit court has no jurisdiction of an attachment returned by a constable unless the sheriff be a party. *Tucker v. Byars*, 46 Miss. 549 (1872); *Barnett v. Ring*, 55 Miss. 97 (1877).

RESEARCH REFERENCES

Am Jur. 2 Am. Jur. Pl & Pr Forms (Rev), Attachment And Garnishment, Forms 141 et seq.

§ 11-33-29. Attachment may be issued and served on Sunday.

Attachments may in all cases be issued and executed on Sunday; and may be executed in any part of the county, by any constable of the county, or by the constable or any police officer of any municipality, in the same manner as the sheriff of the county. In cases of emergency, and when a sheriff or his deputy, or a constable or police officer cannot be had in time, the officer issuing an attachment may appoint some reputable person to execute such attachment; and such officer shall be liable on his bond and individually for the consequence of appointing an insolvent or incompetent person for such service.

SOURCES: Codes, 1857, ch. 52, art. 40; 1871, § 1433; 1880, § 2471; 1892, § 139; Laws, 1906, § 143; Hemingway's 1917, § 135; Laws, 1930, § 133; Laws, 1942, § 2689.

Cross References — Seizure of person or property, see Miss. R. Civ. P. 64.

RESEARCH REFERENCES

Am Jur. 6 Am. Jur. 2d, Attachment and Garnishment §§ 321, 323.
2 Am. Jur. Pl & Pr Forms (Rev), Attachment And Garnishment, Forms 141 et seq.
CJS. 7 C.J.S., Attachment § 173.

§ 11-33-31. Return of writ and bonds.

The officer serving an attachment shall make a full return thereon of all his proceedings, on or before the return day of the writ. He shall deliver to the court or clerk all bonds which he may have taken pursuant to law.

SOURCES: Codes, 1857, ch. 52, art. 6; 1871, § 1436; 1880, § 2425; 1892, § 140; Laws, 1906, § 144; Hemingway's 1917, § 136; Laws, 1930, § 134; Laws, 1942, § 2690.

Cross References — Seizure of person or property, see Miss. R. Civ. P. 64.

JUDICIAL DECISIONS

1. In general.

It cannot be presumed that the officer levied upon any property other than that

enumerated in his return on the writ. *Phillips v. Harvey*, 50 Miss. 489 (1874).

RESEARCH REFERENCES

Am Jur. 6 Am. Jur. 2d, Attachment and Garnishment §§ 347-357.
2 Am. Jur. Pl & Pr Forms (Rev), Attachment And Garnishment, Forms 171 et seq.
CJS. 7 C.J.S., Attachment §§ 194 et seq.

§ 11-33-33. Ancillary attachment.

When a suit shall have been commenced, the plaintiff may obtain an attachment against the defendant, or one or more of them, on making affidavit and giving bond as required in other cases of attachment, which attachment shall be granted, issued, executed, and returned by the same officers; and the like proceedings as far as applicable, shall be had thereon as in other cases. The affidavit, bond, and writ, when returned, shall be filed with the papers in the original suit, which shall not be delayed thereby.

SOURCES: Codes, 1857, ch. 52, art. 13; 1871, § 1482; 1880, § 2461; 1892, § 141; Laws, 1906, § 145; Hemingway's 1917, § 137; Laws, 1930, § 135; Laws, 1942, § 2691.

Cross References — Seizure of person or property, see Miss. R. Civ. P. 64.

§ 11-33-35. Attachment for debt not due.

When any creditor whose debt is not due, shall make affidavit of any of the last six grounds for an attachment, or that he has just cause to suspect, and verily believes, that his debtor will remove himself or his effects out of the state before said debt will become payable, with intent to hinder, delay, or defraud his creditors, or that he hath removed, with like intent, leaving property in this state, and shall give bond as in other cases, he may obtain an attachment returnable to the county where the debtor resides, or last resided, or where his property may be found. Such attachment shall be issued, executed, and returned, and the like proceedings had thereon as in other cases of attachment.

SOURCES: Codes, Hutchinson's 1848, ch. 56, art. 4 (20); 1857, ch. 52, art. 12; 1871, § 1455; 1880, § 2459; 1892, § 142; Laws, 1906, § 146; Hemingway's 1917, § 138; Laws, 1930, § 136; Laws, 1942, § 2692.

Cross References — Bond to discharge attachment for a debt not due, see § 11-33-63.

Judgment in case in which debt is not due, see § 11-33-93.

Debt of garnishee which is not due, see § 11-35-35.

Seizure of person or property, see Miss. R. Civ. P. 64.

JUDICIAL DECISIONS

1. In general.

Where an attachment is sued out in the county where the debtor resides and his property is found, the affidavit and writ alleging a debt due, but the declaration being for a debt in part not due, plaintiff is

entitled to amend the affidavit and writ as to show that the attachment was for a debt not due, and to dismiss as to the part due. *Dalsheimer v. McDaniel*, 69 Miss. 339, 12 So. 338 (1891).

RESEARCH REFERENCES

ALR. Claim, obligation, or liability within contemplation of statute providing for attachment, or giving right of action for indemnity, before debt or liability is

due. 58 A.L.R.2d 1451.

Am Jur. 6 Am. Jur. 2d, Attachment and Garnishment §§ 17, 47, 48.

§ 11-33-37. Publication of notice.

When any writ of attachment shall be executed and returned, if the defendant be not summoned, the clerk of the court shall cause a notice to be published once a week for three weeks in some newspaper published within the county, or in some convenient county, and having a circulation in the county in which the suit is pending, stating the issuance of such attachment, at whose suit, against whose estate, for what sum, and in what court the same is pending and that unless the defendant appear on the first day of the next succeeding term of court and plead to said action, judgment will be entered, and the estate attached will be sold. Such publication may be made before or after the return term of court, but in cases of attachment against persons residing out of this state, the creditor, his agent or attorney, shall file with the clerk his affidavit-if the affidavit for the attachment do not contain such statement-showing the post office of the defendant, or that he has made diligent inquiry to ascertain it without success; and if the post office shall be stated, the clerk shall send by mail to such defendant, at his post office, a copy of such notice, and shall make it appear to the court that he has done so, before judgment shall be rendered on publication of notice; and for a failure of duty in this respect, the clerk may be punished as for contempt.

SOURCES: Codes, Hutchinson's 1848, ch. 56, art. 4 (15); 1857, ch. 52, art. 19; 1871, §§ 1472 et seq.; 1880, § 2437; 1892, § 143; Laws, 1906, § 147; Hemingway's 1917, § 139; Laws, 1930, § 137; Laws, 1942, § 2693.

Cross References — Attachment against nonresidents, see § 11-31-9.

Applicability of provisions of this section to procedures for disposition of property seized in connection with violations of the Uniform Controlled Substances Law (§§ 41-29-101 et seq.), see § 41-29-177.

Procedure for forfeiture of property seized for violation of fish and game laws, see §§ 49-7-251 et seq.

Petition for forfeiture of vehicle due to violation of implied consent law and notice to owner of vehicle, see § 63-11-51.

Service by publication in forfeiture proceeding under alcoholic beverage control law, see § 67-1-93.

Service by publication, in proceeding for forfeiture of vehicle used in drive-by shooting, to be made as provided in this section, see § 97-3-111.

Seizure of person or property, see Miss. R. Civ. P. 64.

JUDICIAL DECISIONS

1. In general.

The fact that service of process by publication, published four times at weekly intervals, in a suit by an attachment at law on the ground of nonresidence to collect an indebtedness, had not been completed for at least five days before the term of court, at which it was returnable, convened, did not render void the judgment rendered. *Stevens v. Barbour*, 193 Miss. 109, 8 So. 2d 242 (1942).

When affidavit for attachment is upon ground of nonresidence of defendant, officer executing attachment writ is not required to make effort to summon defendant. *Walton v. Gregory Funeral Home*, 170 Miss. 129, 154 So. 717 (1934).

Claimant of funds in attachment proceedings has burden of proving improper service alleged to render judgment against attachment debtor invalid. *Piqua Sav. Bank v. Copiah Hdwe. Co.*, 146 Miss.

581, 111 So. 836 (1927).

Where an attachment is sued out against a nonresident of this state, and no personal summons is served on such nonresident or his agent, but publication is depended upon for service, a judgment cannot be rendered at the return term, and if one is entered it is void and will be reversed upon appeal. *Copiah Hdwe. Co. v. Meteor Motor Car Co.*, 136 Miss. 274, 101 So. 375 (1924), error overruled, 136 Miss. 284, 101 So. 579 (1924).

It is not necessary that the clerk of the court mail a copy of the notice to a resident defendant. This notice is only required to be mailed when the suit is against persons residing outside of the state. *H.O. & C.A. Thompson v. J.B. Camors & Co.*, 126 Miss. 772, 89 So. 649 (1921).

Whether the creditor, his agent or attorney filed an affidavit showing the postoffice of the defendant or that he had made diligent inquiry to ascertain it without success, cannot be inquired into in a collateral attack on the judgment rendered. *Cotton v. Harlan*, 124 Miss. 691, 87 So. 152 (1921); *Thompson v. J.C. Camors & Co.*, 126 Miss. 772, 89 So. 649 (1921).

A purchaser at a sale under the judg-

ment in an attachment suit acquires the right of defendant in attachment, and has the same right to file a bill to annul a judgment in a senior attachment, on the ground that the affidavit showing defendant's address or that plaintiff after diligent inquiry was unable to ascertain it, required by Code of 1892 § 143, had not been made. *McKinney v. Adams*, 95 Miss. 832, 50 So. 474 (1909).

A judgment rendered without proof of publication is void. *Oliver v. Baird*, 90 Miss. 718, 44 So. 35 (1907).

Personal service of summons in another state, as authorized by § 3922 Code 1906, will not justify a personal judgment. *Cudabac v. Strong*, 67 Miss. 705, 7 So. 543 (1890).

Where there is no return showing a service of process on defendant and no affidavit as required, although publication be made and be mailed, a judgment by default will be void. *Drysdale v. Biloxi Canning Factory*, 67 Miss. 534, 7 So. 541 (1890).

Publication is to be made after the levy of the writ, if the defendant be not summoned. *Griffing v. Mills*, 40 Miss. 611 (1866).

RESEARCH REFERENCES

ALR. Application of requirement that newspaper be locally published for official notice publication. 85 A.L.R.4th 581.

Am Jur. 6 Am. Jur. 2d, Attachment and Garnishment § 569.

2 Am. Jur. Pl & Pr Forms (Rev), Attachment And Garnishment, Forms 151 et seq.

CJS. 7 C.J.S., Attachment § 378.

§ 11-33-39. When publication unnecessary.

Such publication of notice shall not be necessary if it shall be served on the nonresident defendant, and proof of such service be made as provided for in case of nonresident defendants in chancery; but such proof of service of notice shall be as effectual as if such defendant had been served with a summons.

SOURCES: Codes, 1880, § 2438; 1892, § 144; Laws, 1906, § 148; Hemingway's 1917, § 140; Laws, 1930, § 138; Laws, 1942, § 2694.

Cross References — Seizure of person or property, see Miss. R. Civ. P. 64.

RESEARCH REFERENCES

Am Jur. 2 Am. Jur. Pl & Pr Forms (Rev), Attachment And Garnishment, Forms 151 et seq.

§ 11-33-41. Form of notice required.

The notice of the attachment which the clerk is required to cause to be published may be in the following form, to wit:

“The State of Mississippi to _____ :

An attachment at the suit of _____ against your estate, for _____ dollars, returnable before the circuit court of _____ County, at _____ , Mississippi, has been executed, and is now pending in said court; and unless you appear before said court on the _____ Monday of _____ A. D. _____ , and plead to said action, judgment will be entered, and the estate attached will be sold.

_____, A. D. _____ , Clerk.”

SOURCES: Codes, 1880, § 2439; 1892, § 145; Laws, 1906, § 149; Hemingway’s 1917, § 141; Laws, 1930, § 139; Laws, 1942, § 2695.

Cross References — Applicability of provisions of this section to procedures for disposition of property seized in connection with violations of the Uniform Controlled Substances Law (§§ 41-29-101 et seq.), see § 41-29-177.

Procedure for forfeiture of property seized for violation of fish and game laws, see §§ 49-7-251 et seq.

Petition for forfeiture of vehicle due to violation of implied consent law and notice to owner of vehicle, see § 63-11-51.

Service by publication in forfeiture proceeding under alcoholic beverage control law, see § 67-1-93.

Notice by publication, in proceeding for forfeiture of vehicle used in drive-by shooting, to contain requisites specified in this section, see § 97-3-111.

Seizure of person or property, see Miss. R. Civ. P. 64.

RESEARCH REFERENCES

Am Jur. 2 Am. Jur. Pl & Pr Forms (Rev), Attachment And Garnishment, Forms 151 et seq.

§ 11-33-43. In absence of newspaper.

If there should be no newspaper published within the county in which the attachment is pending, or in a convenient county, such notice shall be posted at the door of the courthouse of the county, and that shall be instead of publication in a newspaper.

SOURCES: Codes, 1880, § 2440; 1892, § 146; Laws, 1906, § 150; Hemingway’s 1917, § 142; Laws, 1930, § 140; Laws, 1942, § 2696.

Cross References — Seizure of person or property, see Miss. R. Civ. P. 64.

RESEARCH REFERENCES

ALR. Application of requirement that newspaper be locally published for official notice publication. 85 A.L.R.4th 581.

Am Jur. 2 Am. Jur. Pl & Pr Forms (Rev), Attachment And Garnishment, Forms 151 et seq.

§ 11-33-45. Property may be replevied.

The defendant, at any time before final judgment, may replevy the personal property seized and taken into possession by the officer serving an attachment, by giving to such officer a bond, with sufficient sureties, to be approved by him, payable to the plaintiff, in double the value of such property, conditioned to have said property forthcoming to answer and abide the judgment of the court in said suit, or, in default thereof, to pay and satisfy the judgment to the extent of the value of said property; and on the execution of such bond, the officer shall restore to the defendant the property so replevied, and shall return the bond so taken with the writ of attachment and all proceedings thereon. Such replevin shall not affect the lien of the attachment, or the proceedings thereon, as to any rights, credits, or choses in action of the defendant.

SOURCES: Codes, Hutchinson's 1848, ch. 56, art. 4 (10); 1857, ch. 52, art. 8; 1871, § 1439; 1880, § 2427; 1892, § 147; Laws, 1906, § 151; Hemingway's 1917, § 143; Laws, 1930, § 141; Laws, 1942, § 2697.

Cross References — Seizure of person or property, see Miss. R. Civ. P. 64.

JUDICIAL DECISIONS

1. In general.

This section [Code 1942, § 2697] applies to a purchase money lien proceeding under § 3080 Code 1906. *Flanagan v. King-Peoples Auto Co.*, 132 Miss. 95, 94 So. 841 (1923).

Under this section [Code 1942, § 2697] the lien of an attachment is not affected by the execution of a bond conditioned to surrender the property to answer and abide the judgment of the court or to pay and satisfy the judgment to the extent of the value of such property. *C.D. Smith & Co. v. Lacey*, 86 Miss. 295, 38 So. 311, 109 Am. St. R. 707 (1905).

A discharge in bankruptcy of the party principally liable does not preclude a creditor, whose attachment had been levied upon the property of the bankrupt more than four months before bankruptcy proceedings, from entering such a qualified judgment against the bankrupt as will charge his sureties on a forthcoming bond.

C.D. Smith & Co. v. Lacey, 86 Miss. 295, 38 So. 311, 109 Am. St. R. 707 (1905).

Although the defendant in a void attachment has replevied the property seized, his appearance alone for the purpose of moving to quash confers no jurisdiction to render judgment against him on the merits. *Wood v. Bailey*, 77 Miss. 815, 27 So. 1001 (1900).

A defendant in attachment by executing a forthcoming bond is estopped to deny the validity of the levy and cannot thereafter have the same quashed on the ground that the property, when seized by the sheriff, was in custodia legis under a previous levy by a constable. *Fenner v. Boutte*, 72 Miss. 271, 16 So. 259 (1894).

If the constable levy on property and turn it over to the sheriff, the latter may take the discharge bond even if he be the plaintiff in the suit. *Forbes & Beck v. Navra*, 63 Miss. 1 (1885).

The surety on the bond cannot plead to the action, or interpose any defense, or

complain of any errors in the action against his principal; but he may contest his original liability on the bond or show a discharge from liability. *Atkinson v. Foxworth*, 53 Miss. 733 (1876).

A surety on a replevin bond is only liable for the value of the property, and the jury must find the value. *Bedon v. Alexander*, 47 Miss. 254 (1872); *Phillips v. Har-*

vey, 50 Miss. 489 (1874).

The execution of a replevy-bond by the defendant before the return day of the writ is equivalent to personal service of process on him, and renders him personally amenable to the jurisdiction of the court. *Richard v. Mooney*, 39 Miss. 357 (1860).

RESEARCH REFERENCES

Am Jur. 6 Am. Jur. 2d, Attachment and Garnishment §§ 540, 542, 546.

CJS. 7 C.J.S., Attachment §§ 248, 259.

§ 11-33-47. Form of bond for replevin of goods.

The defendant's replevin bond may be in the following form, viz.:

"We, _____, principal, and _____ and _____ sureties, bind ourselves to pay _____ dollars, unless the said _____ shall have forthcoming to abide the judgment of the circuit court of _____ County, in the suit by attachment therein pending in which said _____ is plaintiff and said _____ is defendant, returnable on the _____ day of _____, _____ a certain _____ levied on by the sheriff of said county by virtue of said attachment, and valued by him at _____, and now restored to said _____; or in default thereof shall satisfy such judgment to the extent of the value of said property, to replevy which this bond is given.

Witness our hands, this the _____ of _____.

_____ "

SOURCES: Codes, 1880, § 2477; 1892, § 148; Laws, 1906, § 152; Hemingway's 1917, § 144; Laws, 1930, § 142; Laws, 1942, § 2698.

Cross References — Seizure of person or property, see Miss. R. Civ. P. 64.

§ 11-33-49. But one bond required.

If personal property be seized under an attachment writ, and the defendant, or a claimant, replevy the same, giving bond therefor, he shall not be deprived of the property under a subsequent attachment against the same defendant returnable to the same court to which the first writ is returnable; nor shall but one replevy bond be required. The bond given to the plaintiff in the first attachment shall inure to the benefit of the plaintiff in any subsequent attachment, and judgment may be rendered thereon as if it had been made payable to the plaintiff in the subsequent attachment. The officer shall show in his return on a subsequent attachment writ, what prior attachments in same court have been levied upon the property, if any, and whether the property has been replevied therein, naming the sureties on the bond.

SOURCES: Codes, 1892, § 149; Laws, 1906, § 153; Hemingway's 1917, § 145; Laws, 1930, § 143; Laws, 1942, § 2699.

Cross References — Seizure of person or property, see Miss. R. Civ. P. 64.

§ 11-33-51. Execution against sureties.

Where the amount demanded in an untried prior attachment, or the judgment, if the same be tried, shall equal or exceed the value of the property replevied, an execution or other process shall not be issued against the sureties on the replevin bond on a judgment in a subsequent attachment, unless the prior attachment fails, or the judgment therein be satisfied otherwise than by the proceeds of the property replevied.

SOURCES: Codes, 1892, § 150; Laws, 1906, § 154; Hemingway's 1917, § 146; Laws, 1930, § 144; Laws, 1942, § 2700.

Cross References — Seizure of person or property, see Miss. R. Civ. P. 64.

§ 11-33-53. Loss of priority.

If the plaintiff in a prior attachment fail to enforce his judgment, after ten days written notice to do so by the plaintiff in a subsequent attachment, he shall lose his priority; but where the amount of the prior attachment shall be less than the value of the property, process may issue on the subsequent judgment against the sureties on the replevin bond for the difference between the amount of the prior attachment and the value of the property as shown in the officer's return.

SOURCES: Codes, 1892, § 151; Laws, 1906, § 155; Hemingway's 1917, § 147; Laws, 1930, § 145; Laws, 1942, § 2701.

Cross References — Forfeiture of priority of right to enforcement of judgment, see § 11-7-193.

Seizure of person or property, see Miss. R. Civ. P. 64.

RESEARCH REFERENCES

Am Jur. 6 Am. Jur. 2d, Attachment and Garnishment §§ 490 et seq.

CJS. 7 C.J.S., Attachment §§ 206, 219 et seq.

§ 11-33-55. One satisfaction releases sureties.

If the value of the property be paid by the sureties, or the property surrendered as provided in the bond, the judgment in the subsequent attachment shall, as to the sureties on the replevin bond, be satisfied.

SOURCES: Codes, 1892, § 152; Laws, 1906, § 156; Hemingway's 1917, § 148; Laws, 1930, § 146; Laws, 1942, § 2702.

Cross References — Seizure of person or property, see Miss. R. Civ. P. 64.

RESEARCH REFERENCES

Am Jur. 6 Am. Jur. 2d, Attachment and Garnishment §§ 550, 551. **CJS.** 7 C.J.S., Attachment § 131.

§ 11-33-57. Prior attachment from another court.

Execution or other process shall not issue against the sureties on the replevin bond where the property replevied hath been levied upon and replevied in a prior attachment against the same defendant, returnable to another court, unless the amount of the prior attachment and probable costs thereof be first deducted from the value of the property; and in such case execution may issue against the sureties only for the difference.

SOURCES: Codes, 1892, § 153; Laws, 1906, § 157; Hemingway's 1917, § 149; Laws, 1930, § 147; Laws, 1942, § 2703.

Cross References — Seizure of person or property, see Miss. R. Civ. P. 64.

§ 11-33-59. Bond to discharge attachment for a debt due.

If any defendant in attachment for a debt due shall, at any time before the return thereof, execute and deliver to the officer serving the same, a bond, with two or more sufficient sureties, to be approved by said officer, payable to the plaintiff in attachment, in a penalty double the amount claimed by the plaintiff, conditioned to pay and satisfy any judgment which may be recovered by the plaintiff in the suit, with all costs, the attachment shall be thereby discharged; and all the property of every kind levied on, attached or seized by virtue thereof, shall be released and restored to such defendant. The bond shall be returned with the attachment; and in case of any recovery by the plaintiff in the suit, judgment shall be entered against the defendant and the sureties in the said bond. After the return of the attachment, the bond herein provided for may be given at any time before final judgment, and may be taken by the sheriff, or officer by whom the attachment was served, in case any of the attached property remains in his hands; otherwise, by the clerk of the court in which the attachment is pending.

SOURCES: Codes, 1857, ch. 52, art. 11; 1871, § 1440; 1880, § 2428; 1892, § 154; Laws, 1906, § 158; Hemingway's 1917, § 150; Laws, 1930, § 148; Laws, 1942, § 2704.

Cross References — Seizure of person or property, see Miss. R. Civ. P. 64.

JUDICIAL DECISIONS

1. In general.

This section [Code 1942, § 2704] applies to a purchase money lien proceeding

under § 3080 Code 1906. *Flanagan v. King-Peoples Auto Co.*, 132 Miss. 95, 94 So. 841 (1923).

RESEARCH REFERENCES

Am Jur. 6 Am. Jur. 2d, Attachment and Garnishment §§ 550, 551.

§ 11-33-61. Form of bond to discharge attachment for debt due.

The bond to discharge the attachment for a debt due may be in the following form, viz.:

"We, _____ principal, and _____ and _____, as sureties, are held and bound to pay _____ the sum of _____ dollars, unless the said _____ shall satisfy any judgment which may be recovered against him by the said _____ in his attachment suit against the said _____ for _____ dollars, returnable before the circuit court of _____ County, on the _____ day of _____ A. D. _____."

SOURCES: Codes, 1880, § 2478; 1892, § 155; Laws, 1906, § 159; Hemingway's 1917, § 151; Laws, 1930, § 149; Laws, 1942, § 2705.

Cross References — Seizure of person or property, see Miss. R. Civ. P. 64.

§ 11-33-63. Bond to discharge attachment for a debt not due.

If a defendant in attachment for a debt not due, shall on or before the return-day thereof, execute and deliver to the officer serving the same, a bond, with two or more sufficient sureties, to be approved by said officers, payable to the plaintiff in attachment, in a penalty double the amount claimed by the plaintiff, conditioned to pay the said debt when it shall become payable and costs of the attachment, the said attachment shall be discharged thereby, and all the property attached shall be released to the defendant. The bond shall be delivered by the officer to the plaintiff. After the return of the attachment, the bond herein provided for may be given at any time before final judgment, and may be taken by the sheriff or officer by whom the attachment was served, in case any of the attached property remains in his hands, or by the clerk of the court in which the attachment is pending.

SOURCES: Codes, 1892, § 156; Laws, 1906, § 160; Hemingway's 1917, § 152; Laws, 1930, § 150; Laws, 1942, § 2706.

Cross References — Seizure of person or property, see Miss. R. Civ. P. 64.

§ 11-33-65. Form of bond to discharge attachment for debt not due.

The bond to discharge attachment for a debt not due may be in the following form, viz.:

"We, _____ principal, and _____ and _____, sureties, are held and bound to pay _____ the sum of _____ dollars, unless _____ shall well

and truly pay _____ the sum demanded by him as plaintiff is his attachment suit for a debt not due, the sum of _____, dollars, on or before the _____ day of _____, A. D. _____, and pay the costs of said suit, which is pending in the circuit court of _____ County, Mississippi. This the _____ day of _____, A. D. _____."

SOURCES: Codes, 1892, § 157; Laws, 1906, § 161; Hemingway's 1917, § 153; Laws, 1930, § 151; Laws, 1942, § 2707.

Cross References — Seizure of person or property, see Miss. R. Civ. P. 64.

§ 11-33-67. Officer bound if bond insufficient.

If the bond or sureties given by the defendant, or any claimant of the property, or garnishee or other person, be insufficient, then the sheriff or other officer shall be subject to the same judgment with the surety in such bond as if he were cosurety thereon. And the court or judge, being satisfied that such bond is not a sufficient security, may order process to seize the property for which the bond was given; and when seized it shall be dealt with as provided by law upon its seizure in the first instance under attachment.

SOURCES: Codes, 1880, § 2465; 1892, § 158; Laws, 1906, § 162; Hemingway's 1917, § 154; Laws, 1930, § 152; Laws, 1942, § 2708.

Cross References — Seizure of person or property, see Miss. R. Civ. P. 64.

JUDICIAL DECISIONS

1. In general.

This is the exclusive remedy. *Atkinson v. Foxworth*, 53 Miss. 733 (1876).

§ 11-33-69. Claim of third person to attached property.

All the provisions of law in relation to third persons claiming property levied on by virtue of fieri facias shall extend and apply to claimants of property levied on by virtue of writs of attachment. The trial of the right of property shall not be had until after judgment in favor of the plaintiff in the attachment suit, and proceedings in garnishment shall be in accordance with the provisions of law on that subject.

SOURCES: Codes, Hutchinson's 1848, ch. 56, art. 14 (5); 1857, ch. 52, art. 38; 1871, § 1456; 1880, § 2640; 1892, § 159; Laws, 1906, § 163; Hemingway's 1917, § 155; Laws, 1930, § 153; Laws, 1942, § 2709.

Cross References — Trial of right of property, see §§ 11-23-1 et seq.
Seizure of person or property, see Miss. R. Civ. P. 64.

JUDICIAL DECISIONS

1. In general.
2. Bond.
3. Costs.
4. Evidence.
5. Judgment.
6. Levy.
7. Parties.
8. Pleading.
9. Trial.

1. In general.

Where Mississippi resident did business ostensibly as a Tennessee corporation, and attachment was brought as against Tennessee corporation, resident must intervene and defend as the actual original party defendant, rather than as a third-party claimant, and circuit court properly dismissed her appeal from justice court decision, brought on theory that Tennessee corporation did not exist. *Taylor v. Aldridge*, 180 Miss. 635, 178 So. 331 (1938).

The facts set out in an affidavit propounding a claim to proceeds of goods, held to present a good claim. *Kohlman v. First Nat'l Bank*, 71 Miss. 843, 15 So. 131 (1894).

2. Bond.

Claimant of property in proceeding against nonresident and surety on forthcoming bond held not estopped to claim advantage because bond appears to be in replevin. *Mercantile Acceptance Corp. v. Hedgepeth*, 147 Miss. 717, 112 So. 872 (1927).

Personal property seized on attachment and delivered to a claimant under a forthcoming bond is no longer in custodia legis and is subject to execution or attachment by creditors of the claimant. *Hart v. Livermore Foundry & Mach. Co.*, 72 Miss. 809, 17 So. 769 (1895).

Where property embraced in a trust deed has been attached at the suit of creditors of a grantor, a claimant's bond, executed by the trustee, stands in lieu of the property, and a subsequent irregular disposition of the same by the claimant will not render the trust deed fraudulent as to such attaching creditors. *Hooker v. Sutcliff*, 71 Miss. 792, 15 So. 140 (1894).

If a claimant give bond, and be given the property thereon, and his claim is dismissed for want of the proper affidavit, suit may be maintained on the bond. *Higdon v. Vaughn*, 58 Miss. 572 (1882).

3. Costs.

It is within the discretion of the court when a claimant's issue is made in attachment proceedings to require the claimant to file security for costs made by it. *Third Nat'l Bank v. Reeves Grocery Co.*, 113 Miss. 35, 73 So. 866 (1917).

Attorney's fees and other expenses incurred in sustaining a claimant's issue for property seized under attachment are not ordinarily recoverable in a suit on an indemnifying bond. *Moore v. Lowrey*, 74 Miss. 413, 21 So. 237 (1897).

4. Evidence.

Plaintiff cannot show on claimant's issue that title to property attached as owned by defendant was in fact owned by plaintiff. *Forest Lumber Co. v. Lightsey*, 136 Miss. 625, 101 So. 689 (1924).

Plaintiff in attachment has the burden of proof on the trial of the claimant's issue. *Third Nat'l Bank v. Reeves Grocery Co.*, 113 Miss. 35, 73 So. 866 (1917).

On the trial of a claimant's issue, it is error to instruct that the judgment sustaining the attachment is prima facie evidence against the claimant, and places upon him the burden of showing that he is a bona fide purchaser of the goods attached. As against the claimant, such judgment is not evidence of the facts on which it rests. *Ott v. Smith*, 68 Miss. 773, 10 So. 70 (1891).

In the trial of such issue, judgment in plaintiff's favor against the defendant in attachment is a part of the record, and need not be offered in evidence. *French v. Sale*, 60 Miss. 516 (1882).

5. Judgment.

If an attachment issue be found for plaintiff, it is not improper to enter judgment in the usual form, condemning the attached property to the payment of the debt found to be due to plaintiff, although a claimant's issue is pending; but in such case the judgment will not be executed

until the claimant's issue is disposed of. *Montgomery v. Goodbar*, 69 Miss. 333, 13 So. 624 (1891).

6. Levy.

Knowledge by a plaintiff and his attorney that a bill of sale of personal property has been executed by the defendant in execution and duly recorded, does not make a levy thereon a wilful wrong. *Moore v. Lowrey*, 74 Miss. 413, 21 So. 237 (1897).

7. Parties.

Claimants of property levied on and surety became parties to cause and submitted themselves to authority of court. *Mercantile Acceptance Corp. v. Hedgepeth*, 147 Miss. 717, 112 So. 872 (1927).

8. Pleading.

Plaintiff's failure to make issue at return term to try claimant's right to funds in garnishee's hands held not to constitute "default." *Piqua Sav. Bank v. Copiah Hdwe. Co.*, 146 Miss. 581, 111 So. 836 (1927).

The claimant or intervener in attachment is not required to join issue until final judgment in the attachment. *Mahaffey Co. v. Russell & Butler*, 100 Miss. 122, 54 So. 807 (1911), error overruled, 100 Miss. 126, 54 So. 945 (1911).

Plaintiff in attachment by joining issue on a claim to the property when filed, waives right to have the claim dismissed as improperly filed. *Minshaw v. Geo. W.*

Davidson & Co., 86 Miss. 354, 38 So. 315 (1905).

A claimant cannot on mere motion secure the delivery to him of property attached within four months of the debtor's adjudication in bankruptcy. There is privity of estate between the debtor and his trustees and the cause must be disposed of on appropriate pleadings. *New Orleans Acid & Fertilizer Co. v. Grissom*, 79 Miss. 662, 31 So. 336 (1902).

As many claims may be interposed to property seized by attachment and as many issues made up to try the same as may be necessary; and this whether the property remains in court or has been delivered to a claimant on bond. *Dreyfus v. Mayer*, 69 Miss. 282, 12 So. 267 (1891).

9. Trial.

The word "trial" in the last clause of this section [Code 1942, § 2709] is used in its comprehensive sense and means, not alone that the claimant's issue shall not be tried until final judgment in the main case, but that such issue is not to be made up until then, the making up of the issue being a part of the "trial" in the broad meaning of the word. *White v. Roach*, 98 Miss. 309, 53 So. 622 (1910).

When there has been no service of process of any kind of an ancillary writ of attachment, the trial of the claimant's issue after judgment by default for the debt is premature. *Lamb v. Russel*, 81 Miss. 382, 32 So. 916 (1902).

RESEARCH REFERENCES

ALR. Right of successful claimant of property to attorneys' fees for wrongful attachment. 65 A.L.R.2d 1426.

Am Jur. 6 Am. Jur. 2d, Attachment and Garnishment §§ 587 et seq.

Claims of third persons, 2 Am. Jur. Pl & Pr Forms (Rev), Attachment and Garnishment, Forms 491 et seq.

CJS. 7 C.J.S., Attachment §§ 287 et seq.

§ 11-33-71. Property in danger of waste to be sold pending suit.

When goods and chattels levied upon under an attachment are in danger of immediate waste and decay, or when live stock, or a stock of goods of any kind, is so levied upon, and the same is not replevied by the defendant or claimant, the officer holding them may sell them as like property is required to be sold under execution. The proceeds of such sale shall be held by the officer to abide the result of the suit, unless replevied. The owner of such goods may

replevy the same, as in other cases, at any time before sale, and after sale, the money. If the term of court to which the writ of attachment is returnable commences within fifteen days of the levy, none of the property, except such as may be in danger of immediate waste and decay, shall be sold until after the court is held; and if the cause be continued, the property may then be sold.

SOURCES: Codes, Hutchinson's 1848, ch. 56, art. 4 (22); 1857, ch. 52, art. 17; 1871, §§ 1466 et seq.; 1880, § 2462; 1892, § 160; Laws, 1906, § 164; Hemingway's 1917, § 156; Laws, 1930, § 154; Laws, 1942, § 2710.

Cross References — Money paid into the justice court clerk clearing account, see § 9-11-18.

Disposal of property which is not bonded, see § 11-29-13.

Seizure of person or property, see Miss. R. Civ. P. 64.

JUDICIAL DECISIONS

1. In general.

Railroad crossties, though liable to be burned, are not in danger of "immediate

waste and decay." *Goodman v. Moss*, 64 Miss. 303, 1 So. 241 (1887).

RESEARCH REFERENCES

Am Jur. 2 Am. Jur. Pl & Pr Forms (Rev), Attachment And Garnishment, Forms 471 et seq.

§ 11-33-73. How certain other property may be sold pending suit.

When personal property levied upon under an attachment shall not be subject to sale under the provisions of Section 11-33-71, and the same shall not be replevied by the defendant or claimant within ten days after the levy, the judge or the justice of the peace in whose court the suit may be pending, on the application of any party to the suit, and upon ten days' notice to all other parties to the suit of the time and place of the hearing, may make an order directing the officer having custody of said property to sell the same, as provided by law for such sales, under execution, and the proceeds of said sale shall be held by such officer to abide the result of the suit unless replevied by the defendant or claimant.

SOURCES: Codes, 1906, § 165; Hemingway's 1917, § 157; Laws, 1930, § 155; Laws, 1942, § 2711.

Editor's Note — Pursuant to Miss. Const., Art. 6, § 171, all references in the Mississippi Code to justice of the peace shall mean justice court judge.

Cross References — Remedial orders, see § 11-7-169.

Seizure of person or property, see Miss. R. Civ. P. 64.

RESEARCH REFERENCES

Am Jur. 2 Am. Jur. Pl & Pr Forms (Rev), Attachment And Garnishment, Forms 471 et seq.

§ 11-33-75. Death of defendant does not abate action.

If the defendant dies after service of the writ of attachment, the action shall not thereby be abated, but may be prosecuted to judgment, sale, transfer, and final determination as if the defendant's death had not occurred; and all proceedings and conveyances in such case shall be as valid and effectual in law as if had and made in the lifetime of defendant.

SOURCES: Codes, Hutchinson's 1848, ch. 56, art. 4 (28); 1857, ch. 52, art. 39; 1871, § 1486; 1880, § 2466; 1892, § 161; Laws, 1906, § 166; Hemingway's 1917, § 158; Laws, 1930, § 156; Laws, 1942, § 2712.

Cross References — Effect of death of party to action, generally, see § 11-7-29. Seizure of person or property, see Miss. R. Civ. P. 64.

JUDICIAL DECISIONS

1. In general.

If the administrator appear, or be brought into court, a judgment in personam may be rendered against him as such. *Lowenberg v. Tironi*, 62 Miss. 19 (1884).

The administrator of the deceased defendant may appear, whether the deceased was or was not served. *Dyson v. Baker*, 54 Miss. 24 (1876).

The object of the section [Code 1942, § 2712] is to authorize the court, after the attachment was served, notwithstanding the death of defendant, to proceed to judgment and sale, or final process, against the garnishee and property attached. For those purposes, and to that extent, the process is strictly in rem. *Holman v. Fisher*, 49 Miss. 472 (1873).

RESEARCH REFERENCES

ALR. Abatement on ground of prior pending action in same jurisdiction as affected by loss by plaintiff in second action of advantage gained therein by at-

tachment, garnishment, or like process. 40 A.L.R.2d 1111.

Am Jur. 6 Am. Jur. 2d, Attachment and Garnishment § 439.

§ 11-33-77. The declaration and subsequent pleadings.

The declaration may be filed on or before the return day of the attachment or before an order of dismissal be taken; and the defendant shall plead thereto as in other cases.

SOURCES: Codes, 1880, § 2441; 1892, § 162; Laws, 1906, § 167; Hemingway's 1917, § 159; Laws, 1930, § 157; Laws, 1942, § 2713.

Cross References — Declaration or bill, see § 11-1-45. Seizure of person or property, see Miss. R. Civ. P. 64.

JUDICIAL DECISIONS

1. In general.

Section 1475.5, Code of 1942, has supplanted this section [§ 2713] and § 2716, Code of 1942, as well as other sections of the Code dealing with pleas in abatement, and has also supplanted the common-law rules dealing with such pleas. *Home Ins. Co. v. Watts*, 229 Miss. 735, 91 So. 2d 722 (1957), suggestion of error sustained, 229 Miss. 735, 93 So. 2d 848 (1957).

This section [Code 1942, § 2713], providing that when there is a plea in abatement there shall be no plea to the merits until the issue of abatement has been disposed of, and Code 1942, § 2716, providing for the empanelling of a jury to try the issue of abatement, are supplanted by Laws 1948, ch. 230 [Code 1942, § 1475.5] abolishing pleas in the circuit court and providing for all defenses, whether consistent or not, to be set out in an answer, to the extent that separate hearings on distinct, separable defenses are left to the judicial discretion of the trial court. *Christopher v. Brown*, 211 Miss. 322, 51 So. 2d 579 (1951).

Where the trial court tries attachment and debt issues together and both sides acquiesced by not making any objection, any error in this joinder was waived. *Christopher v. Brown*, 211 Miss. 322, 51 So. 2d 579 (1951).

Where the declaration for the debt was defective in failing to allege the amount due, neither a motion to strike it from the files on the theory that it was legally insufficient in substance nor motion to quash the attachment on the same grounds was the proper method for presenting the question. *Kehlor Flour Mills Co. v. Reeves Grocery Co.*, 113 Miss. 30, 73 So. 866 (1917).

The attachment may be against one debtor and the declaration in the cause be against several, provided the debt owing by the debtors not attached be due when the declaration is filed against them. *Terry v. Curd & Sinton Mfg. Co.*, 66 Miss. 394, 6 So. 229 (1889).

§ 11-33-79. Judgment by default.

If the defendant shall not appear and plead to the action, in pursuance of notice, the court, as in other cases, shall give judgment against him by default, and award a writ of inquiry if necessary; but on such judgment by default, unless granted on the service of summons executed in this state, no execution shall issue except against the property on which the attachment has been served, or against a garnishee who shall have money or property in his hands belonging to the defendant.

SOURCES: Codes, *Hutchinson's* 1848, ch. 56, art. 4 (25); 1857, ch. 52, art. 21; 1871, § 1477; 1880, § 2467; 1892, § 163; Laws, 1906, § 168; *Hemingway's* 1917, § 160; Laws, 1930, § 158; Laws, 1942, § 2714.

Cross References — Seizure of person or property, see Miss. R. Civ. P. 64.

JUDICIAL DECISIONS

1. In general.

Plaintiff's failure to make issue at return term to try claimant's right to funds in garnishee's hands held not to constitute "default." *Piqua Sav. Bank v. Copiah*

Hdwe. Co., 146 Miss. 581, 111 So. 836 (1927).

Sale without giving bond on default decree, in attachment against nonresident on publication, is void. *Seay v. Wofford*,

141 Miss. 888, 106 So. 751 (1926), motion overruled, 106 So. 927 (Miss. 1926).

Where there has been no service of process of any kind of an ancillary writ of attachment, the trial of a claimant's issue after judgment by default for the debt is premature. *Lamb v. Russel*, 81 Miss. 382, 32 So. 916 (1902).

A judgment for the debt in attachment should be set aside for want of jurisdiction when there has been no levy upon property or garnishment in the county where the action was brought, although an alias writ of attachment has been served upon the defendant as a summons in another county where he resides. *Campbell v. Triplett*, 74 Miss. 365, 20 So. 844 (1896).

Although judgment for plaintiff is entered on the attachment for want of a plea in abatement, yet if the debt issue is decided for defendant, this is conclusive evidence that the attachment was wrongfully sued out and defendant has a right of action for damages on the attachment-bond. *Buckly v. Van Diver*, 70 Miss. 622, 12 So. 905 (1893).

Where judgment by default on the attachment issue is rendered for plaintiff, but the issue made by the plea denying the debt is found for defendant, thus dissolving the attachment, the defendant is not entitled to a writ of inquiry to assess

his damages for the wrongful suing out of the attachment. *Betancourt v. Maduel*, 69 Miss. 839, 11 So. 111 (1892).

Such writ of inquiry is allowed only where the issue on a plea in abatement is found for defendant, or where plaintiff voluntarily dismisses his attachment. *Betancourt v. Maduel*, 69 Miss. 839, 11 So. 111 (1892).

Nor can a personal judgment be sustained by service of process in another state. *Cudabac v. Strong*, 67 Miss. 705, 7 So. 543 (1890).

The attachment may be against one debtor and the declaration in the cause be against several, provided the debt owing by the debtors not attached be due when the declaration is filed against them. *Terry v. Curd & Sinton Mfg. Co.*, 66 Miss. 394, 6 So. 229 (1889).

Although a judgment by default against a nonresident be personal in form, it cannot, if he were notified by publication only, affect any of his property except that attached and condemned. *Tabler, Crudup & Co. v. Mitchell*, 62 Miss. 437 (1884).

A judgment against a defendant in an attachment case is, in legal effect, a judgment of condemnation ordering the sale of the property attached, and no formal order for sale in the judgment is necessary. *Sale v. French*, 61 Miss. 170 (1883).

RESEARCH REFERENCES

ALR. What amounts to "appearance" under statute or rule requiring notice, to party who has "appeared," of intention to take default judgment. 73 A.L.R.3d 1250.

§ 11-33-81. Defendant may defend without replevying property.

The defendant in attachment may appear, without replevying the property attached, and defend the suit as in other actions for the recovery of money. In case the defendant shall have been personally summoned, or shall appear and plead to the action, the judgment therein shall have the same force and effect against the person and property of the defendant as in other actions where a summons has been personally served on him. Such appearance shall not vacate or affect any bond taken hereunder, nor discharge any garnishee, nor affect any lien created by the attachment; but the proceedings in respect to any property attached, or any garnishee summoned, shall be the same as if final judgment had been entered by default.

SOURCES: Codes, 1857, ch. 52, art. 20; 1871, § 1476; 1880, § 2436; 1892, § 164; Laws, 1906, § 169; Hemingway's 1917, § 161; Laws, 1930, § 159; Laws, 1942, § 2715.

Cross References — Attachment against nonresidents, see § 11-31-9.
Seizure of person or property, see Miss. R. Civ. P. 64.

JUDICIAL DECISIONS

1. In general.

Defendant in attachment suit may file counterclaim for actual damages and attorney's fee. *Crooke v. Deas & Duke*, 146 Miss. 260, 111 So. 293 (1927).

Notwithstanding defendant in attachment has enjoined various creditors from proceeding with their suits in so far as to

disturb his possession of certain property claimed to be in custodia legis in other proceedings, they may proceed to obtain personal judgments, and if the defendant fails to defend on the merits, he is bound by such judgments. *Hart v. Livermore Foundry & Mach. Co.*, 72 Miss. 809, 17 So. 769 (1895).

§ 11-33-83. Answer traversing truth of alleged attachment grounds; trial of issue.

The defendant in attachment may, as a defense in his answer, traverse the truth of the alleged grounds upon which the attachment was sued out. Upon such defense being filed, the court, in its discretion, upon motion of either or any party, may order a jury to be empaneled to try the issue, or it may submit such issue to the jury empaneled to try the case on its merits. If the jury shall find for the defendant, it shall assess damages against the plaintiff for wrongfully suing out the same.

SOURCES: Codes, 1857, ch. 52, art. 14; 1871, § 1459; 1880, § 2429; 1892, § 165; Laws, 1906, § 170; Hemingway's 1917, § 162; Laws, 1930, § 160; Laws, 1942, § 2716.

Cross References — Seizure of person or property, see Miss. R. Civ. P. 64.

JUDICIAL DECISIONS

1. In general.
2. Evidence.
3. Setoff or counterclaim.
4. Assessment of damages.

1. In general.

Section 1475.5, Code 1942, has supplanted this section [§ 2716] and § 2713, Code of 1942, as well as other sections of the Code dealing with pleas in abatement, and has also supplanted the common-law rules dealing with such pleas. *Home Ins. Co. v. Watts*, 229 Miss. 735, 91 So. 2d 722 (1957), suggestion of error sustained, 229 Miss. 735, 93 So. 2d 848 (1957).

The provisions of this section [Code 1942, § 2716], providing for the

empanelling of a jury to try the issue raised by a plea in abatement, and Code 1942, § 2713, providing that no plea to the action shall be made until the issue raised by a plea in abatement of the attachment shall be disposed of, are supplanted by Laws 1948, ch. 230 [Code 1942, § 1475.5], which abolishes pleas in the circuit court and provides for every defense, whether consistent or not, to be set out in an answer, to the extent that the granting of separate hearings on particular, distinct and separable offenses is left to the judicial discretion of the trial court. *Christopher v. Brown*, 211 Miss. 322, 51 So. 2d 579 (1951).

Where the trial court tries attachment and debt issues together and both sides acquiesced by not making any objection, any error in this joinder was waived. *Christopher v. Brown*, 211 Miss. 322, 51 So. 2d 579 (1951).

In an action on an account begun by attachment, the question whether the debt was due cannot be raised where not set up by a plea in abatement. *Lee v. McConnell*, 109 Miss. 839, 69 So. 706 (1915).

A denial of the ground of attachment in a plea in abatement is not a denial of indebtedness so as to make them an issue on the trial of the right to attach. *Anderson v. Dever*, 109 Miss. 235, 68 So. 166 (1915).

If an attachment issue be found for plaintiff, it is not improper to enter judgment in the usual form condemning the attached property to the payment of the debt found to be due to plaintiff, although a claimant's issue is pending; but in such case the judgment will not be executed until the claimant's issue is disposed of. *Montgomery v. Goodbar*, 69 Miss. 333, 13 So. 624 (1891).

Since to authorize an attachment against a debtor on the ground of nonresidence the debt must be due, a plea in abatement that it was not due when suit was begun is sufficient. *Stadler v. Jacobs*, 70 Miss. 429, 12 So. 444 (1893).

Unless the question is one of the defendant's estoppel to deny the ground of attachment, plaintiff's belief as to defendant's solvency or the truth of the grounds of attachment is immaterial. *Stadler v. Jacobs*, 70 Miss. 429, 12 So. 444 (1893).

Special allegations in the plea, if the plea deny the grounds, do not vitiate it; but the traverse should be a simple denial. *Ross v. Fowler*, 42 Miss. 293 (1868).

The issue is whether or not the attachment was rightfully sued out, and not whether the matters of fact stated in the affidavit are true or false. The doctrine of estoppel applies. *Cocke v. Kuykendall*, 41 Miss. 65 (1866).

2. Evidence.

Evidence held to warrant peremptory instruction that attachment was wrongfully sued out. *Turner v. Crane*, 115 Miss. 134, 75 So. 945 (1917).

On plea of abatement to attachment on the ground of concealment and fraudulent disposition and conversion of property, testimony of ability to pay does not entitle the defendant to a peremptory instruction. *Anderson v. Dever*, 109 Miss. 235, 68 So. 166 (1915).

On the trial of the attachment issue, the plaintiff's affidavit having alleged fraudulent conduct of the debtor, evidence of the latter's rating or want of rating by commercial agencies, unconnected with any conduct of the debtor on which it was based, was properly excluded as irrelevant. *Lowenstein v. Aaron*, 69 Miss. 341, 12 So. 269 (1891).

3. Setoff or counterclaim.

Defendant in attachment suit may file counterclaim for actual damages and attorney's fee. *Crooke v. Deas & Duke*, 146 Miss. 260, 111 So. 293 (1927).

Appeal is authorized from judgment in attachment and garnishment of less than \$50.00 where counterclaim for damages after deducting judgment exceeded \$50.00. *Crooke v. Deas & Duke*, 146 Miss. 260, 111 So. 293 (1927).

Where defendant recovers a judgment for damages, and plaintiff's action thereby abates, and the assignee of such judgment seeks to enforce it, plaintiff, though his claim has meantime become barred, the defendant being insolvent, may resort to equity to enforce his right conferred by Code 1880, § 2687, to use said claim defensively as an offset against the judgment. *Feld v. Coleman*, 72 Miss. 545, 17 So. 378 (1895).

4. Assessment of damages.

Defendant is only entitled to a writ of inquiry where the issue on a plea in abatement is found for him, or where the plaintiff dismisses his attachment. *Betancourt v. Maduel*, 69 Miss. 839, 11 So. 111 (1892).

RESEARCH REFERENCES

ALR. Abatement on ground of prior pending action in same jurisdiction as

affected by loss by plaintiff in second action of advantage gained therein by at-

tachment, garnishment, or like process.
40 A.L.R.2d 1111.

Am Jur. 6 Am. Jur. 2d, Attachment and

Garnishment §§ 444, 622, 627, 628, 636.

CJS. 7 C.J.S., Attachment §§ 357-362.

§ 11-33-85. Answer traversing truth of alleged attachment grounds; damages in favor of defendant.

On the trial of the issue of the truth of the alleged attachment grounds, the defendant may introduce evidence as to the actual damages, if any, which the issuance of the attachment has occasioned him; but the defendant, when he files his answer setting up the defense traversing the truth of the alleged attachment grounds, shall file therewith written notice of what damages he will insist upon at the trial. If the issue be decided for the defendant, he shall have judgment that the attachment be discharged and against plaintiff and the sureties in his attachment bond, for the damages assessed by the jury and the costs of suit; and the jury may add to the actual damages found a reasonable sum as an attorney's fee for defending the issue; but the judgment against the sureties in the attachment bond shall not exceed the penalty thereof.

SOURCES: Codes, 1857, ch. 52, art. 14; 1871, § 1462; 1880, § 2430; 1892, § 166; Laws, 1906, § 171; Hemingway's 1917, § 163; Laws, 1930, § 161; Laws, 1942, § 2717.

Cross References — Seizure of person or property, see Miss. R. Civ. P. 64.

JUDICIAL DECISIONS

1. In general.
2. Measure and elements of damages.

1. In general.

This section clearly provides that the testing of the grounds of attachment shall be in the court initiating the suit and that actual damages shall be proved in that court. Failure of garnishee to follow proper procedure entitled the creditor to a peremptory instruction in the garnishee's action for wrongful garnishment. *Tower Loan Brokers of Miss., Inc. v. Davis*, 320 So. 2d 770 (Miss. 1975).

Appeal is authorized from judgment in attachment and garnishment of less than \$50 where counterclaim for damages after deducting judgment exceeded \$50. *Crooke v. Deas & Duke*, 146 Miss. 260, 111 So. 293 (1927).

A Defendant in wrongful attachment is entitled to have his damages assessed on writ of inquiry if the question of indebtedness be decided in his favor, though the

grounds of attachment were not contested. *R.J. McLin & Co. v. Worden*, 99 Miss. 547, 55 So. 358 (1911).

Where an attachment, though based on nonresidence of defendant, was improperly sued out because there was no debt, under Code 1892, § 166, defendant may have judgment on the bond in the attachment suit without resort to an independent action. *C.M. Carrier & Son v. Poulas*, 87 Miss. 595, 40 So. 164 (1906).

Defendant is not entitled to a writ of inquiry to assess his damages for the wrongful suing out of the attachment except where the issue on a plea in abatement is found for him, or where plaintiff voluntarily dismisses his attachment. *Betancourt v. Maduel*, 69 Miss. 839, 11 So. 111 (1892).

The jury has as large a scope to consider the damages on a plea traversing the grounds of attachment as in a suit on the attachment bond. *Fleming & Baldwin v.*

Bailey, 44 Miss. 132 (1870); *Marqueze v. Sontheimer*, 59 Miss. 430 (1882).

2. Measure and elements of damages.

Jury may not assess nominal damages where proof discloses actual damages. *Levy v. J.A. Olson Co.*, 237 Miss. 452, 115 So. 2d 296 (1959).

It is defendant's duty to reduce damages by giving bond and retaining possession of attached property. *Levy v. J.A. Olson Co.*, 237 Miss. 452, 115 So. 2d 296 (1959).

Person incurring attorney's fees in bringing suit for damages for attachment for rent is entitled to recover therefor. *Wigginton v. Moore*, 147 Miss. 169, 113 So. 326 (1927).

Defendant in attachment suit may file counterclaim for actual damages and attorney's fee. *Crooke v. Deas & Duke*, 146 Miss. 260, 111 So. 293 (1927).

Damages of a remote and speculative character cannot be received for the wrongful suing out of attachment. *Turner v. Crane*, 115 Miss. 134, 75 So. 945 (1917).

Loss of business, as to goods attached, caused by the attachment, may be a factor

in estimating damages, if proved as a matter of fact and not as a mere opinion or estimate of witnesses. *Marqueze v. Sontheimer*, 59 Miss. 430 (1882).

Damages resulting from a levy by judgment creditors, subsequent to the levy of an attachment, made in consequence of the attachment, cannot be recovered of the attaching plaintiff. *Marqueze v. Sontheimer*, 59 Miss. 430 (1882).

Compensation is the measure of damages. *Marqueze v. Sontheimer*, 59 Miss. 430 (1882).

Where there is no malice or intent to oppress, the damages should be limited to those actually sustained; mere possible expectations of profits are not to be considered. *Myers v. Farrell*, 47 Miss. 281 (1872).

The extent of the depreciation in value between the time property was attached, and the time the attachment is quashed or the property is restored, is the measure of the actual damages for preventing a sale of the property. *Fleming & Baldwin v. Bailey*, 44 Miss. 132 (1870).

RESEARCH REFERENCES

ALR. Right to attorneys' fees for wrongful attachment. 65 A.L.R.2d 1426.

What constitutes malice sufficient to justify an award of punitive damages in action for wrongful attachment or garnishment. 61 A.L.R.3d 984.

Attorneys' fees: cost of services provided

by paralegals or the like as compensable element of award in state court. 73 A.L.R.4th 938.

Am Jur. 2 Am. Jur. Proof of Facts, Attachment, Proof No. 1 (Wrongful attachment).

§ 11-33-87. Answer traversing truth of alleged attachment grounds—effect of decision in plaintiff's favor.

If the issue on the defense traversing the truth of the alleged attachment grounds be decided for plaintiff, the defendant shall be permitted to go on to trial of the merits upon his answer as a whole.

SOURCES: Codes, 1857, ch. 52, art. 14; 1871, § 1464; 1880, § 2431; 1892, § 169; Laws, 1906, § 174; Hemingway's 1917, § 166; Laws, 1930, § 163; Laws, 1942, § 2719.

Cross References — Seizure of person or property, see Miss. R. Civ. P. 64.

JUDICIAL DECISIONS

1. In general.

The defendant cannot plead to the merits without waiving his plea in abatement.

Lewenthall v. Mississippi Mills, 55 Miss. 101 (1877).

§ 11-33-89. Property assessment and judgment in certain cases.

If the personal property attached, or any part thereof, shall have been replevied by the defendant, the court or jury trying the issue between the parties, if it find for the plaintiff, shall assess the value of the property so replevied by the defendant, as well as the debt or damages due the plaintiff. If the value of the property shall equal the amount found due the plaintiff, judgment shall be entered against the defendant and his sureties in such replevin bond, for the amount of said value. If the value of the property be less than the amount found due the plaintiff, judgment shall be entered against the defendant for the amount of the verdict, and against the sureties in his replevin bond for the value of the property so replevied. If judgment by default shall be entered in such case against the defendant, an inquiry shall be awarded to assess the value of the property so replevied; and on the execution thereof judgment shall be rendered as above provided. In all cases, the judgment against the sureties of the defendant shall be satisfied and discharged by the delivery to the sheriff of the property replevied within ten days after execution on such judgment shall have come to his hands; and the sheriff shall sell the property so delivered to him, and apply the proceeds to the payment of the execution.

SOURCES: Codes, 1857, ch. 52, art. 9; 1871, § 1448; 1880, § 2455; 1892, § 167; Laws, 1906, § 172; Hemingway's 1917, § 164; Laws, 1930, § 162; Laws, 1942, § 2718.

Cross References — Seizure of person or property, see Miss. R. Civ. P. 64.

JUDICIAL DECISIONS

1. In general.

Rendering decree on forthcoming bond for penalty without finding value of automobile claimed thereunder held erroneous. *Mercantile Acceptance Corp. v. Hedgepeth*, 147 Miss. 717, 112 So. 872 (1927).

Where the attachment is levied on various articles which are replevied, the value of each article separately should be assessed. *Thomason v. Wadlington*, 53 Miss. 560 (1876); *Atkinson v. Foxworth*, 53 Miss. 733 (1876).

The sureties, when it is proposed to enter judgment against them, may show

any reason, good in law, why the bond should not be declared forfeited; they may show that it is impossible to return animals bonded, because they had died without the fault or negligence of their principal. *Atkinson v. Foxworth*, 53 Miss. 741 (1876).

Plaintiff cannot take judgment in the attachment against the defendant only, the principal in the bond, and afterwards bring a separate action against the sureties. *McKinney v. Green*, 52 Miss. 70 (1876).

If the value of the property be not assessed, it is error to render judgment for

the whole of plaintiff's demand against the sureties. *Phillips v. Harvey*, 50 Miss. 489 (1874).

A failure to comply with the statute

vitiates the verdict. *Young v. Pickens & Green*, 45 Miss. 553 (1871); *Bedon v. Alexander*, 47 Miss. 254 (1872).

RESEARCH REFERENCES

Am Jur. 6 *Am. Jur. 2d*, Attachment and Garnishment §§ 573 et seq.

CJS. 7 *C.J.S.*, Attachment §§ 387-391.

§ 11-33-91. Voluntary dismissal and damages.

The plaintiff may dismiss his attachment, but defendant shall have a jury impanelled forthwith to assess the damages sustained by reason of suing out the attachment.

SOURCES: *Codes*, 1871, § 1465; 1880, § 2432; 1892, § 168; *Laws*, 1906, § 173; *Hemingway's* 1917, § 165; *Laws*, 1930, § 164; *Laws*, 1942, § 2720.

Cross References — Seizure of person or property, see *Miss. R. Civ. P.* 64.

JUDICIAL DECISIONS

1. In general.

When the issue in abatement is found against several defendants, and the plaintiff, failing to establish his debt as to one, dismisses as to him, the judgment on plea in abatement is thereby vacated as to this defendant, and he is entitled to have his

damages assessed. *Dean v. Stephenson*, 61 Miss. 175 (1883).

If such defendant fail to ask for damages or make claim for the property or its proceeds, he can neither obtain a new trial nor appeal. *Dean v. Stephenson*, 61 Miss. 175 (1883).

RESEARCH REFERENCES

ALR. Effect of nonsuit, dismissal, or discontinuance of action on previous orders. 11 *A.L.R.2d* 1407.

§ 11-33-93. Judgment in case debt not due.

In determining the amount for which judgment shall be rendered on the merits in favor of plaintiff whose debt is not due, interest shall not be computed on the principal for a time beyond the rendition of the judgment; and if the debt do not bear interest until a future day, the principal shall be discounted for the time to elapse before interest begins, at the rate at which the debt will bear interest. Such judgments shall be enforced as in other cases.

SOURCES: *Codes*, 1892, § 170; *Laws*, 1906, § 175; *Hemingway's* 1917, § 167; *Laws*, 1930, § 165; *Laws*, 1942, § 2721.

Cross References — Attachment for debt not due, see § 11-33-35.

Bond to discharge attachment for a debt not due, see § 11-33-63.

Seizure of person or property, see *Miss. R. Civ. P.* 64.

§ 11-33-95. Judgment for damages pleadable as payment.

The judgment in favor of the defendant against the plaintiff for the damages assessed and the costs may be pleaded by the defendant as a payment in the same action, or in any other suit on the same cause of action on which the attachment was sued out. An execution shall not be issued on such judgment until after the dismissal of the action or final judgment on the merits. If the action be dismissed, or if, upon a trial on the merits, judgment be in favor of the defendant, without his having obtained the benefit of the judgment in his favor for damages and costs, he shall have execution of said judgment in his favor. If the plaintiff recover in the trial on the merits, and on such trial the defendant did not avail of his judgment against the plaintiff for damages and costs, the greater recovery shall be credited with the sum of the smaller, and judgment shall be rendered by the court in favor of the party to whom the difference may be due.

SOURCES: Codes, 1880, § 2433; 1892, § 171; Laws, 1906, § 176; Hemingway's 1917, § 168; Laws, 1930, § 166; Laws, 1942, § 2722.

Cross References — Seizure of person or property, see Miss. R. Civ. P. 64.

JUDICIAL DECISIONS

1. In general.

Where defendant recovers a judgment for damages, and plaintiff's action thereby abates and the assignee of such judgment seeks to enforce it, plaintiff though his claim has meantime become barred, the

defendant being insolvent, may resort to equity to enforce his right conferred by § 2756 Code 1880, to use said claim defensively as an offset against the judgment. *Feld v. Coleman*, 72 Miss. 545, 17 So. 378 (1895).

§ 11-33-97. Discharge of attachment not to affect action.

If the issue on the defense traversing the truth of the alleged attachment grounds be found for the defendant, the attachment shall be thereby discharged, and all property seized under it, and all persons summoned as garnishees, shall be released from it; but the action, unless dismissed by the plaintiff, shall be proceeded with in all respects as if it had been an ordinary action in its commencement; and the costs accruing in it, after the trial of the issue on the said defense, shall abide the result of such action.

SOURCES: Codes, 1880, § 2434; 1892, § 172; Laws, 1906, § 177; Hemingway's 1917, § 169; Laws, 1930, § 167; Laws, 1942, § 2723.

Cross References — Seizure of person or property, see Miss. R. Civ. P. 64.

JUDICIAL DECISIONS

1. In general.

An action commenced by attachment shall not be dismissed over the objection of

the plaintiff when the issue on a plea in abatement is found for the defendant, but should be proceeded with as if it had been

an ordinary action in the commencement. *McCormick v. Hawks*, 131 Miss. 111, 95 So. 241 (1923).

This section [Code 1942, § 2723] does not apply if the attachment be so utterly void as not to be amendable, and there

was no trial on a plea in abatement, no summons and no appearance of the defendant save to object to the void attachment. *Wood v. Bailey*, 77 Miss. 815, 27 So. 1001 (1900).

§ 11-33-99. Attachment preserved by appeal.

If the plaintiff, within ten days after the expiration of the term of the court at which judgment is rendered discharging his attachment, shall perfect an appeal from such judgment, the attachment shall not be discharged, nor garnishees nor property released therefrom, by such judgment; but such appeal shall preserve the attachment in full force, to await the result of the appeal.

SOURCES: Codes, 1880, § 2435; 1892, § 173; Laws, 1906, § 178; *Hemingway's* 1917, § 170; Laws, 1930, § 168; Laws, 1942, § 2724.

Cross References — Seizure of person or property, see Miss. R. Civ. P. 64.

JUDICIAL DECISIONS

1. In general.

There is no statute such as this section [Code 1942, § 2724], which preserves the status quo of an attachment in chancery after an appeal has been taken. *General Acceptance Corp. v. Holbrook*, 189 So. 2d 923 (Miss. 1966).

This section [Code 1942, § 2724] authorizes an appeal, and provides for the effect thereof, only in the case discharging the attachment. *Craig v. Barber Bros. Contracting Co.*, 190 Miss. 182, 199 So. 270 (1940). But see *De La Beckwith v. State*, 615 So. 2d 1134 (Miss. 1992), cert. denied, 510 U.S. 884, 114 S. Ct. 232, 126 L. Ed. 2d 187 (1993).

This section [Code 1942, § 2724] does not authorize an appeal from an order or a judgment vacating a writ of garnishment and dismissing the suit as to a garnishee where the garnishment is issued as a part of an attachment writ in a suit which is still pending in the trial court at the time

the appeal is allowed. *Craig v. Barber Bros. Contracting Co.*, 190 Miss. 182, 199 So. 270 (1940). But see *De La Beckwith v. State*, 615 So. 2d 1134 (Miss. 1992), cert. denied, 510 U.S. 884, 114 S. Ct. 232, 126 L. Ed. 2d 187 (1993).

Judgment for defendant on plea in abatement in attachment is appealable, though appeal is not taken within ten days after adjournment of the term. *Chas. Brooks & Co. v. Gentry*, 108 Miss. 447, 66 So. 812 (1914).

And if not prosecuted within the specified time, the lien is discharged. *Lowenstein v. Powell*, 68 Miss. 73, 8 So. 269 (1890).

The statute must be fully complied with or the lien will be discharged. If the appeal bond has but one surety, when two are required, the lien will not be preserved. *Pfiefer & Dreyfus v. Hartman*, 60 Miss. 505 (1882).

§ 11-33-101. Intervention by other creditors.

Any creditor of the defendant in attachment, upon filing a petition under oath, averring that he is a creditor, and that the grounds of attachment alleged are untrue, or that the attachment was sued out by collusion between the plaintiff and the defendant, or that the debt claimed by the defendant is fictitious or simulated, in whole or in part, or any other fact showing fraud or

collusion in suing out the attachment, may intervene and make defense, and in such case the facts stated in the petition shall be tried; but the intervening creditor must give bond, payable to the plaintiff, in such penalty and with such sureties as the court or judge may prescribe, conditioned to pay the costs of the trial in case the issue be found against him.

SOURCES: Codes, 1892, § 174; Laws, 1906, § 179; Hemingway's 1917, § 171; Laws, 1930, § 169; Laws, 1942, § 2725.

Cross References — Intervention of creditors in an attachment action instituted against the debtor, see Miss. R. Civ. P. 24.

Seizure of person or property, see Miss. R. Civ. P. 64.

JUDICIAL DECISIONS

1. In general.

The intervener cannot defeat the whole attachment by showing that a part only of the debt is not due, the purpose of the section [Code 1942, § 2725] being to afford him protection only to the extent that he avers and proves that the debt is not due. *First Nat'l Bank v. Solomon*, 71 Miss. 889, 16 So. 302 (1894).

The issue presented is between the intervener, proceeding in his own name, and the plaintiff. Defendant is not a party, and is not concluded by a judgment in favor of plaintiff as against the intervener. *First Nat'l Bank v. Solomon*, 71 Miss. 889, 16 So. 302 (1894).

Creditors may proceed in the chancery court to vacate attachments fraudulently sued out through collusion with the debtor, and to subject the attached property to their demands, notwithstanding

they have a remedy at law by intervening and contesting the attachments. *McBride v. Adams*, 70 Miss. 716, 12 So. 699 (1893).

A creditor intervening cannot object to the insufficiency of the declaration or the absence of an itemized account. The truth of the allegations of the petition is the only issue to be tried. *First Nat'l Bank v. Cochran*, 71 Miss. 175, 14 So. 439 (1893); *First Nat'l Bank v. Solomon*, 71 Miss. 889, 16 So. 302 (1894).

On the trial of the attachment issue, the plaintiff's affidavit having alleged fraudulent conduct of the debtor, evidence of the latter's rating or want of rating by commercial agencies, unconnected with any conduct of the debtor on which it was based, was properly excluded as irrelevant. *Lowenstein v. Aaron*, 69 Miss. 341, 12 So. 269 (1891).

RESEARCH REFERENCES

ALR. Right of successful intervener or claimant of property to attorneys' fees for wrongful attachment. 65 A.L.R.2d 1426.

Am Jur. 6 Am. Jur. 2d, Attachment and

Garnishment §§ 592-603.

CJS. 7 C.J.S., Attachment §§ 287 et seq.

§ 11-33-103. But one trial.

But one trial shall be allowed under the provisions of Section 11-33-101, unless the petitions of the intervenors present different issues; and if the judgment be in favor of the intervening creditor, he shall recover of the plaintiff and his sureties the costs of suit, and the attachment shall be dissolved.

SOURCES: Codes, 1892, § 175; Laws, 1906, § 180; Hemingway's 1917, § 172; Laws, 1930, § 170; Laws, 1942, § 2726.

Cross References — Seizure of person or property, see Miss. R. Civ. P. 64.

RESEARCH REFERENCES

ALR. Lack or insufficiency of allegations of plaintiff's residence or domicile as ground for vacation of, or collateral attack on, divorce decree. 55 A.L.R.2d 1263.

§ 11-33-105. Proceedings before justice court judge.

Justice court judges shall have cognizance of attachments in all cases where the amount in controversy is within their jurisdiction. In such case, the notice to a defendant not found shall require the appearance of the defendant at some reasonable time, to be fixed by the judge, not less than one (1) month after the return day of the attachment, and shall be transmitted by such judge by mail to the defendant at his post office, when stated. Such notice shall not be published in a newspaper, but shall be posted in three (3) public places, where they will be likely to be seen by persons in the county of the justice court judge, three (3) weeks before the time for the appearance of the defendant. Such mailing and posting, or posting alone when the post office is not stated, shall be in lieu of publication in a newspaper in attachments before a justice court judge, and shall authorize such further proceedings as are provided for in other cases of publication.

SOURCES: Codes, Hutchinson's 1848, ch. 56, art. 4 (13); 1857, ch. 52, art. 41; 1871, § 1481; 1880, § 2472; 1892, § 176; Laws, 1906, § 181; Hemingway's 1917, § 173; Laws, 1930, § 171; Laws, 1942, § 2727; Laws, 1981, ch. 471, § 36; Laws, 1982, ch. 423, § 28, made eff from and after January 1, 1984, or, with respect to a given county, from and after such earlier date as the county appoints a justice court clerk pursuant to § 9-11-27(3).

Cross References * — Money paid into the justice court clerk clearing account, see § 9-11-18.

Proceedings in replevin, attachment, and enforcement of liens, see § 11-9-135.

Writ in attachment proceedings, see §§ 11-33-17, 11-33-19.

Seizure of person or property, see Miss. R. Civ. P. 64.

JUDICIAL DECISIONS

1. In general.

On direct attack on judgment against defendant in attachment, defendant has burden to show meritorious defense and that statutory notices were not, in fact, posted. *Walton v. Gregory Funeral Home*, 170 Miss. 129, 154 So. 717 (1934).

Failure to establish by proof that defendant received notice of attachment proceedings while she was nonresident of State held not to affect validity of proceedings under attachment, where proof showed that notice of attachment was properly mailed to her true address. *Wal-*

ton v. Gregory Funeral Home, 170 Miss. 129, 154 So. 717 (1934).

Where judgment of justice of peace in attachment proceeding adjudicated that notice was given to nonresident defendant by mail addressed to post office address, there was no presumption that service of notice was completed by posting notices. *Wentworth v. Flowers*, 163 Miss. 39, 139 So. 624 (1932).

Where judgment in attachment proceeding in justice of peace court was not based on sufficient notice to nonresident defendant to require his appearance, it

was void, and sale conferred no title on purchaser. *Wentworth v. Flowers*, 163 Miss. 39, 139 So. 624 (1932).

A justice of the peace has jurisdiction to issue the writ and try the cause in an attachment suit against a nonresident, although the only property attached is in another district of the county; and this, too, where there is a qualified and acting justice in such other district. *Griggs v. Jesse French Piano & Organ Co.*, 70 Miss. 211, 14 So. 24 (1892).

If plaintiff loses an attachment suit in a justice court and appeals, the circuit court has jurisdiction, though after dismissal by the plaintiff, to allow claimant's issues to be made up and tried, although no trial thereof was had in the justice court, for the appeal of the plaintiff on the main ground carries with it all such ancillary issues as are necessary to determine the proper disposition of the property. *Dreyfus v. Mayer*, 69 Miss. 282, 12 So. 267 (1891).

RESEARCH REFERENCES

Am Jur. 47 Am. Jur. 2d, Justices of the Peace § 29.

CJS. 51 C.J.S., Justices of the Peace § 79.

§ 11-33-107. Trial before justice of the peace.

On the return of an attachment before a justice of the peace, the defendant may file an affidavit, or plea sworn to, traversing the grounds on which the attachment was sued out, and the justice shall hear all evidence adduced by either party, as to whether said attachment was wrongfully sued out or not; and, if the same was wrongfully sued out, he shall dismiss the attachment, with costs, and shall give judgment against the plaintiff for such damages as the defendant may have sustained by the wrongful suing out of said attachment, and shall proceed to hear the case on the merits.

SOURCES: Codes, *Hutchinson's* 1848, ch. 56, art. 4 (24); 1857, ch. 52, art. 42; 1880, § 2474; 1892, § 177; Laws, 1906, § 182; *Hemingway's* 1917, § 174; Laws, 1930, § 172; Laws, 1942, § 2728.

Editor's Note — Pursuant to Miss. Const., Art. 6, § 171, all references in the Mississippi Code to justice of the peace shall mean justice court judge.

Cross References — Money paid into the justice court clerk clearing account, see § 9-11-18.

Seizure of person or property, see Miss. R. Civ. P. 64.

RESEARCH REFERENCES

Am Jur. 47 Am. Jur. 2d, Justices of the Peace § 29.

CJS. 51 C.J.S., Justices of the Peace § 79.

CHAPTER 35

Garnishment

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§ 11-35-1. When issued on judgment or decree.

On the suggestion in writing by the plaintiff in a judgment or decree in any court upon which an execution may be issued, that any person, either natural or artificial, including the state, any county, municipality, school district, board or other political subdivision thereof, is indebted to the defendant therein, or has effects or property of the defendant in his, her or its possession, or knows of some other person who is indebted to the defendant, or who has effects or property of the defendant in his, her or its possession, it shall be the duty of the clerk of such court to issue a writ of garnishment, directed to the sheriff or proper officer, commanding him to summon such person, the state, county,

municipality, school district, board or other political subdivision thereof, as the case may be, as garnishee to appear at the term of court to which the writs of garnishment may be returnable, to answer accordingly.

SOURCES: Codes, Hutchinson's 1848, ch. 62, art. 7 (1); 1857, ch. 61, art. 313; 1871, § 874; 1880, § 1738; 1892, § 2130; Laws, 1906, § 2337; Hemingway's 1917, § 1932; Laws, 1930, § 1838; Laws, 1942, § 2783; Laws, 1936, ch. 321; Laws, 1990, ch. 378, § 1, eff from and after July 1, 1990.

Cross References — Fieri facias or garnishment on decrees for money, see § 11-5-81.

Judgments in circuit court, see §§ 11-7-169 et seq.

Form of writ of garnishment on a judgment or decree, see § 11-35-5.

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15. Claim of garnishee against defendant.
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17. Limitations.

1. In general.

This section is the equivalent of a direct action statute which simply permits a suit against the insurer, without joining the insured. *Boston v. Titan Indem. Co.*, 34 F. Supp. 2d 419 (N.D. Miss. 1999).

28 USCS § 1331 does not confer Federal District Court with subject matter jurisdiction with respect to garnishment proceeding, since action for writ of garnishment arises from state law, not federal law. *Berry v. McLemore*, 795 F.2d 452 (5th Cir. 1986).

Insurance company against which suggestion of garnishment is filed by judgment creditor is entitled to summary judgment dismissing cause with prejudice where judgment creditor admits in answer to company's motion for summary judgment that creditor is seeking to garnish proceeds from wrong company. *Briggs v. Benjamin*, 467 So. 2d 932 (Miss. 1985).

Section 11-35-1 allows a creditor to proceed against another said to be indebted to the creditor's debtor only after the creditor has obtained a judgment against such debtor. *First Miss. Nat'l Bank v. KLH Indus., Inc.*, 457 So. 2d 1333 (Miss. 1984).

Mississippi garnishment proceedings are removable to federal court. *Moore v. Sentry Ins. Co.*, 399 F. Supp. 929 (S.D. Miss. 1975).

A judgment in favor of the plaintiff in a personal injury suit was a final judgment against the defendant within the "no-action" clause of the defendant's policy although an appeal was pending, where the defendant in appealing, filed no supersedeas bond, so that a garnishment determination that the defendant's liability insurer was indebted to the defendant and was subject to garnishment was justified, although the garnishee insurer was only liable for the amount of its insurance contract plus interest and damages. *Wil-*

liams v. Moran, 233 So. 2d 110 (Miss. 1970).

The issue whether a judgment creditor wrongfully caused the issuance of a garnishment which was served upon the judgment debtor's employer, resulting in the debtor's discharge, was a question which should be submitted to a jury for its determination. *Wilkerson v. Randall*, 254 Miss. 546, 180 So. 2d 303 (1965).

Where garnishment is concerned only with proceeds of C.O.D. collections in interstate commerce, this does not constitute an unreasonable interference with interstate commerce. *Keathley v. Hancock*, 212 Miss. 1, 53 So. 2d 29 (1951).

Procedure in suit in chancery court against nonresident debtor must be in accord with that of chancery court. *Inman v. Travelers' Ins. Co.*, 153 Miss. 405, 121 So. 107 (1929), motion overruled, 154 Miss. 611, 122 So. 537 (1929).

The chapter on garnishment and the independent chapter on exemptions must be so construed as to give harmonious effect to both. *Chapman v. Berry*, 73 Miss. 437, 18 So. 918, 55 Am. St. R. 546 (1895).

2. Nature and effect of proceeding.

Writ of attachment in chancery may not be used as independent basis for default judgment. *Federal Sav. & Loan Ins. Corp. v. S. & W. Constr. Co.*, 475 So. 2d 145 (Miss. 1985).

Where there is no contingency as to the garnishee's liability, the only contingency being as to the amount of it, and where the amount of liability is capable of definite ascertainment, there is no contingency to prevent garnishment of the claim. *American Nat'l Ins. Co. v. United States Fid. & Guar. Co.*, 215 So. 2d 245 (Miss. 1968).

A subrogee is entitled to the benefit of all the remedies of the subrogor, and may use all of the means which the subrogor could employ to enforce payment, including garnishment. *American Nat'l Ins. Co. v. United States Fid. & Guar. Co.*, 215 So. 2d 245 (Miss. 1968).

Various types of insurance policies have been recognized as subject to garnishment, and there is no reason why in a proper case the proceeds of an employees' fidelity bond would not be so subject. *American Nat'l Ins. Co. v. United States*

Fid. & Guar. Co., 215 So. 2d 245 (Miss. 1968).

The judgment creditor succeeds to the rights of the judgment debtor in a garnishment proceeding. *United States Fire Ins. Co. v. Coggins*, 195 So. 2d 482 (Miss. 1967).

In a garnishment proceeding, it is the obligation which is attached and the form of action does not determine the character of obligation. *Keathley v. Hancock*, 212 Miss. 1, 53 So. 2d 29 (1951).

Garnishment does not extend the lien of the judgment upon which it is founded. *Grace v. Pierce*, 127 Miss. 831, 90 So. 590, 21 A.L.R. 1035 (1922).

A garnishment is not an original suit in reference to jurisdictional amount. *Martin v. Harvey*, 54 Miss. 685 (1877).

3. Suggestion of garnishment.

Method of pleading suggestion for garnishment prescribed in § 11-35-1 et seq. is simple and consistent with what is required in Mississippi Rule of Civil Procedure 8; on other hand, requirement of Rule 9(c) relating to pleading of conditions precedent is foreign to statutory garnishment procedures and as such may not be enforced in garnishment action. *Leader Nat'l Ins. Co. v. Lindsey*, 477 So. 2d 1323 (Miss. 1985).

Allegation in suggestion of garnishment filed by judgment creditor in automobile negligence suit against judgment debtor's automobile liability carrier that carrier had insurance policy with judgment debtor in full force and effect at time of auto accident is sufficient in substance to allege fulfillment of all conditions precedent to recovery under policy. *Leader Nat'l Ins. Co. v. Lindsey*, 477 So. 2d 1323 (Miss. 1985).

Judgment creditor may, if the facts justify it, suggest any one or more of the four grounds for garnishment to be answered by the garnishee, and a suggestion of garnishment alleging only two of the statutory grounds, instead of all four grounds, is sufficient. *Universal Life Ins. Co. v. Catchings*, 169 Miss. 26, 152 So. 817 (1934).

Judgment creditor, in suggestion of garnishment against foreign insurance corporation, need not allege that garnishee is authorized and is doing business in state,

but must prove such fact. *Universal Life Ins. Co. v. Catchings*, 169 Miss. 26, 152 So. 817 (1934).

4. Service and return of process.

Certified copy of appointment of Insurance Commissioner as agent for foreign corporation for service of process held sufficient proof of such fact as basis for service of writ of garnishment. *Universal Life Ins. Co. v. Catchings*, 169 Miss. 26, 152 So. 817 (1934).

The presence of the garnishee within the state where service is had upon him gives the court jurisdiction of his person. *Southern Pac. R.R. v. A.J. Lyon & Co.*, 99 Miss. 186, 54 So. 728, *Am. Ann. Cas.* 1913D,800 (1911), error overruled, 54 So. 784 (Miss. 1911).

A justice of the peace having two separate places in the county to hold his regular courts may properly make a writ of garnishment returnable to either of said places although he holds an intervening term at the other place. *Edwards v. Kingston Lumber Co.*, 92 Miss. 598, 46 So. 69 (1908).

Where a writ of garnishment omits to require an answer in writing, or to require the garnishee to answer whether he was indebted to defendant at the time of the summoning of the garnishee, or since that time or whether he has since had effects of defendant, a return by the officer that he had handed to the garnishee "a true notice of the within" is sufficient, since notice of everything in the writ would not be a compliance with the statute which entitled the garnishee to "notice the writing" of the answer he is required to make. A judgment by default on such return will be reversed. *Acme Lumber Co. v. Francis Vandergrift Shoe Co.*, 70 Miss. 91, 11 So. 657 (1892).

A garnishee may waive the service, and if so, his answer will be sufficient if it relate only to the time of answering. *Roy v. Heard & Simmons*, 38 Miss. 544 (1860).

A garnishment, as to the garnishee, is original process and must be executed as such. *Jefferies v. Harvie*, 38 Miss. 97 (1859); *Roy v. Heard & Simmons*, 38 Miss. 544 (1860); *Hoffman v. Levi Simon & Co.*, 52 Miss. 302 (1876).

5. Persons subject to garnishment.

A judgment creditor in an automobile accident case was not entitled to a writ of garnishment against the insurer of an automobile which had been driven by the uninsured judgment debtor, the judgment debtor being a stranger to the policy containing the uninsured motorist coverage issued by the insurer to the owner of the automobile, and the judgment creditor's only resort would be to prove his case against the insurer in a direct action against the insurer. *Saint Paul Fire & Marine Ins. Co. v. Arnold*, 254 So. 2d 872 (Miss. 1971).

If a creditor can enforce a claim against his debtor in a certain jurisdiction, that claim can be garnished, and the debtor summoned as garnishee in that jurisdiction in an action against the creditor. *Keathley v. Hancock*, 212 Miss. 1, 53 So. 2d 29 (1951).

Jurisdiction to attach or garnish a debt is not dependent upon the abstract conception of the situs of the indebtedness in question, but rather upon the power of the court over the person of the garnishee, and more particularly upon the liability of the garnishee to suit in such courts by its creditor. *Keathley v. Hancock*, 212 Miss. 1, 53 So. 2d 29 (1951).

Where property is devised to one with the request that he shall pay an annuity to a third person, by accepting the provisions of the will the devisee becomes the debtor of such person and may be garnished. *Red v. Powers*, 69 Miss. 242, 13 So. 586 (1891).

6. State and municipal corporations.

Where a writ of garnishment has been properly served upon a county through its chancery clerk and it appeared that the county was indebted to the judgment debtor for labor and services performed for the county each month since the date of the service of the writ, it was the duty of the chancery clerk, representing the board of supervisors, to make proper answer to the writ, including the amount of the monthly payments, in order that a proper judgment could be obtained in case the amount due under the warrants to be issued to the debtor was above the exemption allowed him by law. *Dunlop Tire &*

Rubber Corp. v. Williams, 251 Miss. 442, 169 So. 2d 783 (1964).

Tendency of the legislature has been to enlarge the right of garnishment against public bodies, such as the State, counties and municipalities, even in law cases. *Mid-South Paving Co. v. Trinidad Asphalt Mfg. Co.*, 197 Miss. 751, 21 So. 2d 646 (1945), error overruled, 197 Miss. 751, 22 So. 2d 497 (1945).

7. —Under prior law.

A public officer's salary in the hands of the Government is not subject to garnishment. *Scruggs v. Electric Paint & Varnish Co.*, 140 Miss. 615, 105 So. 745 (1925).

A municipality, unless subjected thereto by statute, is not liable to a suit by garnishment or otherwise for debts arising from its exercise of governmental functions. *Clarksdale Compress & Storage Co. v. W.R. Caldwell Co.*, 80 Miss. 343, 31 So. 790 (1902).

A plaintiff who seeks to subject a municipality to garnishment on the ground that its debt to the defendant was contracted in its private capacity and not in the exercise of governmental functions must show the nature of the transaction and the facts which render it amenable to the process. *Clarksdale Compress & Storage Co. v. W.R. Caldwell Co.*, 80 Miss. 343, 31 So. 790 (1902).

A county cannot be garnished either at law or in equity if its board of supervisors object. *Dollar v. Allen W. Comm'n Co.*, 78 Miss. 274, 28 So. 876 (1900).

8. Property subject to garnishment.

A joint account should be garnishable only in proportion to the debtor's ownership of the funds, as to which evidence is admissible to show what portion of the funds is actually owned by each depositor. *Delta Fertilizer, Inc. v. Weaver*, 547 So. 2d 800 (Miss. 1989).

Where the evidence established that the funds paid into court in a garnishment proceeding were for the purchase price of raw milk sold by the defendants to a dairy corporation, the defendants were not employees of the corporation and the funds were not for personal services, and consequently the tenth subsection of Code 1942, § 307, was inapplicable. *Beam v. Greenville Mills*, 215 So. 2d 253 (Miss. 1968).

A debt or claim which is uncertain or contingent, in the sense that it may never become due and payable, is not garnishable; and under this theory, a claim for unliquidated damages cannot be reached by garnishment process. *American Nat'l Ins. Co. v. United States Fid. & Guar. Co.*, 215 So. 2d 245 (Miss. 1968).

The statute authorizing garnishment of a county does not operate to subject the fees of public officers to garnishment proceedings. *Bearry v. Stringfellow*, 247 Miss. 683, 157 So. 2d 491 (1963).

Contents of safety deposit box rented by judgment debtor in garnishee bank held subject to garnishment as property in "possession or control" of garnishee bank. *Wineman v. Clover Farms Dairy*, 168 Miss. 583, 151 So. 749 (1934).

Debtor renting safety deposit box in garnishee bank may obtain court order protecting his right of privacy as to personal papers of confidential nature contained within box. *Wineman v. Clover Farms Dairy*, 168 Miss. 583, 151 So. 749 (1934).

An unliquidated liability for damages, because of a tort, is not subject to garnishment either at law or in equity. *Blair v. Kansas City, M. & B.R. Co.*, 76 Miss. 478, 24 So. 879 (1899).

A debt due by a stockholder in an insolvent corporation, who has not paid up his stock, may be reached by garnishment. *Scott v. Windham*, 73 Miss. 76, 16 So. 206 (1894).

A judgment debtor of a debtor can be garnished. *Gray v. Henby*, 9 Miss. (1 S. & M.) 598 (1844); *O'Brien v. Liddell*, 18 Miss. (10 S. & M.) 371 (1848).

9. —Partnership property.

Where a survivor of a mercantile firm continues business in the firm name, it not being shown that he had authority to do so, debts thereafter accruing in the business, though nominally due to the firm, are subject to garnishment by his individual creditors. *Brenner v. Hirsche*, 69 Miss. 309, 13 So. 730 (1891).

10. —Debt due several persons jointly.

A debt due to several persons jointly, but not as partners, may be garnished by a creditor of one of them in view of Code 1892, §§ 751, 752 and 2143. *Fewell v.*

American Sur. Co., 80 Miss. 782, 28 So. 755, 92 Am. St. R. 625 (1902).

11. —Property in hands of agent.

Where a mercantile business was conducted under the name of "Ormond Grocery Co.," without a sign disclosing its owner, the proceeds of a policy of fire insurance on goods acquired and used in such business and burned, is liable to the creditors of the party who transacted the business, although in truth he was the agent of an undisclosed principal, and may be garnished by them. *Meridian Land & Indus. Co. v. J.B. Ormond & Co.*, 82 Miss. 758, 35 So. 179 (1903).

12. —Property in custody of the law.

Money lawfully taken from arrested person by sheriff held subject to garnishment. *Blaylock v. J. Rubel & Co.*, 119 So. 503 (Miss. 1928).

Money in the hands of a sheriff under execution is subject to garnishment. *Laurel Mills v. Ward*, 137 Miss. 221, 102 So. 263 (1924).

A constable having money collected by him under execution, which is payable to the plaintiff therein, is subject to garnishment. *Burleson v. Milan*, 56 Miss. 399 (1879).

13. Assignment or transfer before garnishment.

A third person claimant's defense that the debts garnished had been transferred raised a question of fact for the jury as to the bona fides of such transfer. *Reeves Grocery Co. v. Thompson*, 105 Miss. 729, 63 So. 187 (1913).

A creditor of a nonresident corporation, which has been consolidated into a new nonresident one, may attach the new corporation and garnish a debt to the old company. *Morrison v. American Snuff Co.*, 79 Miss. 330, 30 So. 723, 89 Am. St. R. 598 (1901).

A valid assignment of a judgment will defeat a subsequent garnishment of the judgment debtor by a creditor of the assignor, although when the garnishment was served such debtor had no notice of the assignment. *Schoolfield v. Hirsh*, 71 Miss. 55, 14 So. 528, 42 Am. St. R. 450 (1893).

14. Priority.

When a written notice of a claim to a fund by laborers has been served subsequent to a writ of garnishment, the garnishment being the first in time is first in right. *Herrin v. Warren & Mobley*, 61 Miss. 509 (1884).

15. Claim of garnishee against defendant.

The garnishee would have the right to set off any debt due him from the judgment debtor, but it must be actually applied to garnishee's debt; and if not applied, but paid to the debtor, such payment would be at the peril of the garnishee. *Brondum v. Rosenblum*, 151 Miss. 91, 117 So. 363 (1928).

A garnishee should plead specifically a claim for damages against defendant, but if he fails, and proof is admitted without specific objections to his damages as an offset, the plaintiff waives the special plea. *Melton Hdwe. Co. v. Heidelberg*, 91 Miss. 598, 44 So. 857, 15 Am. Ann. Cas. 704 (1907).

16. Judgment against garnishee.

Variance between name of defendant in judgment on which garnishment was issued and that stated in the suggestion for, and the writ of, garnishment, and in the judgment thereon, rendered the judgment against the garnishee void and was not a mere error which, under Code 1942, § 1347, was released by garnishee suing out an injunction restraining writ of execution. *Campbell v. Yazoo & Miss. V. Ry. Co.*, 199 Miss. 309, 24 So. 2d 531 (1946).

A judgment by default against a garnishee cannot be sustained where the original judgment was void and will be reversed on appeal. *Copiah Hdwe. Co. v. Meteor Motor Car Co.*, 136 Miss. 274, 101 So. 375 (1924), error overruled, 136 Miss. 284, 101 So. 579 (1924).

The validity of a judgment against garnishee is dependent upon the validity of the judgment in the main action. *Moody & Williams v. Dye*, 125 Miss. 770, 88 So. 332 (1921).

No greater interest can be acquired by a judgment creditor by garnishment than the debtor himself had in funds or property. *Schuler v. Murphy*, 91 Miss. 518, 44 So. 810, 124 Am. St. R. 708 (1907).

A garnishment upon a judgment against the "Southern Insurance Company of New Orleans" is not void and the garnishee cannot escape liability because the record does not show whether the defendant in the judgment is a corporation, natural person or a partnership. *Winner v. McMullan*, 77 Miss. 662, 27 So. 618 (1900).

The judgment against the garnishee

must not be larger than the judgment against the original defendant. *Hoffman v. Levi Simon & Co.*, 52 Miss. 302 (1876).

17. Limitations.

If the original judgment is barred by statute of limitations the garnishment proceedings thereon will be void. *Grace v. Pierce*, 127 Miss. 831, 90 So. 590, 21 A.L.R. 1035 (1922).

RESEARCH REFERENCES

ALR. Foreign attachment or garnishment as available in action by nonresident against nonresident or foreign corporation upon a foreign cause of action. 14 A.L.R.2d 420.

Funds deposited in court as subject of garnishment. 1 A.L.R.3d 936.

Attachment and garnishment of funds in branch bank or main office of bank having branches. 12 A.L.R.3d 1088.

Issues in garnishment as triable to court or to jury. 19 A.L.R.3d 1393.

Liability of creditor for excessive attachment or garnishment. 56 A.L.R.3d 493.

Right of judgment creditor to demand that debtor's tender of payment be in cash or by certified check rather than by uncertified check. 82 A.L.R.3d 1199.

Garnishee's duty to give debtor notice of garnishment prior to delivery of money without judgment against the garnishee on the debt. 36 A.L.R.4th 824.

Sufficiency, as to content, of notice of garnishment required to be served upon garnishee. 20 A.L.R.5th 229.

Modern views as to validity, under federal constitution, of state prejudgment attachment, garnishment, and replevin procedures, distraint procedures under landlords' or innkeepers' line statutes, and like procedures authorizing summary seizure of property. 18 A.L.R. Fed. 223.

Construction and application of 42 USCS § 659(a) authorizing garnishment against United States or District of Columbia for enforcement of child support and alimony obligations, 44 A.L.R. Fed. 494.

Am Jur. 6 Am. Jur. 2d, Attachment and Garnishment §§ 71 et seq.

2 Am. Jur. Pl & Pr Forms (Rev), Attachment And Garnishment, Forms 201 et seq.

CJS. 38 C.J.S., Garnishment §§ 18 et seq.

§ 11-35-3. When issued on suing out attachment.

If, at the time of issuing a writ of attachment, or thereafter before the attachment issue has been tried, the attaching creditor shall suggest that any person is indebted to the debtor, or has property of the debtor in his hands, or knows of any other person so indebted or who has effects or property of the debtor in his hands, the officer issuing the writ of attachment shall insert therein a command to summon such person to appear on the return day of the attachment, to answer accordingly.

SOURCES: Codes, *Hutchinson's* 1848, ch. 56, art. 4 (6); 1857, ch. 52, art. 4; 1871, § 1430; 1880, § 2422; 1892, § 2131; Laws, 1906, § 2338; *Hemingway's* 1917, § 1933; Laws, 1930, § 1839; Laws, 1942, § 2784.

Cross References — Attachment in chancery against nonresident, absent or absconding debtors, see §§ 11-31-1 et seq.

Attachment at law against debtors, see §§ 11-33-1 et seq.

What writ is to be served upon and what is bound by the levy, see § 11-33-23.

Form of writ of garnishment when issued by the sheriff, see § 11-35-7.

Enrolling a judgment, see § 27-65-57.

Seizure of person or property, see Miss. R. Civ. P. 64.

JUDICIAL DECISIONS

1. In general.

Plaintiff in attachment has burden of proof. *Third Nat'l Bank v. Reeves Grocery Co.*, 113 Miss. 35, 73 So. 866 (1917).

A writ of garnishment issued under this section which fails to notify the party garnished to make answer in writing, will not support a judgment by default against the garnishee. *Work Bros. & Co. v. Waggoner*, 82 Miss. 591, 35 So. 137 (1903).

Sections 136, 140 (Code of 1890), authorizing officers to summon garnishees by writs of garnishment, issued and served by themselves, does not destroy or abridge the power conferred by this section [Code 1942, § 2784] on circuit clerks or other officers who issue attachments, to insert an order for garnishment as part thereof. *C.C. Kelly Banking Co. v. Hollingsworth*, 71 Miss. 141, 13 So. 932 (1893).

If a circuit clerk or other officer who issued the original attachment writ afterward, on suggestion of plaintiff, issues a simple writ of garnishment for designated persons, instead of an alias writ of attachment and garnishment, the writ is not void, but merely defective, and may be amended. *C.C. Kelly Banking Co. v. Hollingsworth*, 71 Miss. 141, 13 So. 932 (1893).

Where a writ of attachment embodies a garnishment, but the sheriff, instead of summoning the garnishee thereunder, issues and serves an independent writ of garnishment, the latter writ is not invalid, though unnecessary. *Acme Lumber Co. v. Francis Vandergrift Shoe Co.*, 70 Miss. 91, 11 So. 657 (1892); *First Nat'l Bank v. First Nat'l Bank*, 72 Miss. 258, 16 So. 904 (1894).

In case the writ show on its face that a certain person has been suggested for garnishment, the sheriff must summon him even if there be no direct command in the writ to do so. *Semmes v. Patterson*, 65 Miss. 6, 3 So. 35 (1887).

No man can be cited as garnishee beyond the jurisdiction of his own state unless he holds property or holds a debt due and payable in the jurisdiction where garnished. *Bush v. Nance*, 61 Miss. 237 (1883).

A garnishee cannot object to irregularities in proceedings against the principal debtor, unless they are such as to render the judgment void, and if the garnishment does not name the garnishees the return must, but a return of "executed" is sufficient on a writ which gives the name. *Benson v. Holloway*, 59 Miss. 358 (1881).

RESEARCH REFERENCES

ALR. What is an action for "debt" within attachment or garnishment statute. 12 A.L.R.2d 787.

Sufficiency, as to content, of notice of garnishment required to be served upon

garnishee. 20 A.L.R.5th 229.

Am Jur. 2 Am. Jur. Pl & Pr Forms (Rev), Attachment And Garnishment, Forms 201 et seq.

§ 11-35-5. Form for writ of garnishment on judgment or decree.

The writ of garnishment, when issued on a judgment or decree, may be in the following form, to wit:

"THE STATE OF MISSISSIPPI.

"To any lawful officer of _____ county:

"Whereas, _____ recovered a judgment in _____ court of _____ county, on the _____ day _____, A. D. _____, for the sum of _____ dollars and costs, against _____, and the judgment has not been satisfied, and said _____ having made the proper suggestion for a writ of garnishment against _____:

"We therefore command you to summon said _____ to appear in said court, at _____, on the _____ day of _____, A. D. _____, then and there to answer, on oath in writing, whether (here copy in full every particular that a garnishee is required to answer). And have you then and there this writ, with your proceedings indorsed thereon.

"Witness my signature (and if by a clerk, add an official seal), this _____ day of _____, A. D. _____."

The writ must be signed by the officer who issues it, and his official character should be written after his name.

SOURCES: Codes, 1892, § 2132; Laws, 1906, § 2339; Hemingway's 1917, § 1934; Laws, 1930, § 1840; Laws, 1942, § 2785.

Cross References — When garnishment is issued on judgment or decree, see § 11-35-1.

Seizure of person or property, see Miss. R. Civ. P. 64.

JUDICIAL DECISIONS

1. In general.

Judgment creditor may, if facts justify it, suggest any one or more of four grounds for garnishment to be answered by garnishee. *Universal Life Ins. Co. v. Catchings*, 169 Miss. 26, 152 So. 817 (1934).

Suggestion of garnishment, alleging only two of statutory grounds, instead of all four grounds, held sufficient. *Universal Life Ins. Co. v. Catchings*, 169 Miss. 26, 152 So. 817 (1934).

RESEARCH REFERENCES

Am Jur. 6 Am. Jur. 2d, Attachment and Garnishment §§ 374 et seq.

Garnishment, 2 Am. Jur. Pl and Pr Forms (Rev), Attachment and Garnishment, Forms 221 et seq.

2 Am. Jur. Pl & Pr Forms (Rev), Attachment And Garnishment, Forms 211 et seq.

CJS. 38 C.J.S., Garnishment §§ 162 et seq.

§ 11-35-7. Form of the writ of garnishment—when issued by the sheriff.

When the sheriff issues a writ of garnishment in executing an attachment, it may be in the following form:

"THE STATE OF MISSISSIPPI.

"To _____, garnishee:

"Whereas, the undersigned holds an attachment writ against _____, as defendant at the suit of _____, as plaintiff, and it appearing that you should be summoned as garnishee:

"We therefore command you to appear in the _____ court, at _____, on the _____ day of _____, A. D. _____, being the return day of said attachment, then and there in said attachment suit to answer (here copy in full every particular that a garnishee is required to answer). Herein fail not, under penalty of having judgment rendered against you for the whole amount of plaintiff's demand.

"Witness my signature, this _____ day of _____, A. D. _____ .
"_____"

The original must be returned to the court properly indorsed with the mode of service and the defendant served, as in other cases.

SOURCES: Codes, 1892, § 2133; Laws, 1906, § 2340; Hemingway's 1917, § 1935; Laws, 1930, § 1841; Laws, 1942, § 2786.

Cross References — Summoning of creditor of judgment debtor in garnishment proceeding, see § 11-35-3.

Seizure of person or property, see Miss. R. Civ. P. 64.

JUDICIAL DECISIONS

1. In general.

Sections 136, 140 (Code of 1890), authorizing officers to summon garnishees by writs of garnishment, issued and served by themselves, does not destroy or abridge the power conferred by this section [Code 1942, § 2784] on circuit clerks or other officers who issue attachments, to insert an order for garnishment as part thereof. *C.C. Kelly Banking Co. v. Hollingsworth*, 71 Miss. 141, 13 So. 932 (1893).

If a circuit clerk or other officer who issued the original attachment writ afterward, on suggestion of plaintiff, issues a simple writ of garnishment for designated persons, instead of an alias writ of attach-

ment and garnishment, the writ is not void, but merely defective, and may be amended. *C.C. Kelly Banking Co. v. Hollingsworth*, 71 Miss. 141, 13 So. 932 (1893).

Where a writ of attachment embodies a garnishment, but the sheriff, instead of summoning the garnishee thereunder, issues and serves an independent writ of garnishment, the latter writ is not invalid, though unnecessary. *Acme Lumber Co. v. Francis Vandergrift Shoe Co.*, 70 Miss. 91, 11 So. 657 (1892); *First Nat'l Bank v. First Nat'l Bank*, 72 Miss. 258, 16 So. 904 (1894).

RESEARCH REFERENCES

Am Jur. 2 Am. Jur. Pl & Pr Forms (Rev), Attachment And Garnishment, Forms 211 et seq.

§ 11-35-9. Service.

A writ of garnishment, whether issued in a case of attachment or on a judgment or decree, shall be served as a summons is required by law to be executed; but if the garnishee be not personally served, and make default, judgment nisi shall be rendered against him, and a scire facias awarded,

returnable to the next term, unless the court be satisfied that the garnishee can be personally served at once, in which case it may be returnable *instanter*.

SOURCES: Codes, 1892, § 2134; Laws, 1906, § 2341; Hemingway's 1917, § 1936; Laws, 1930, § 1842; Laws, 1942, § 2787.

Cross References — Service of writs on public officer, see § 11-35-11.

Issuing of summons, see §§ 13-3-5 et seq.

Provisions relative to orders for withholding amounts of overdue child support payments from income of obligors, see §§ 93-11-101 through 93-11-119.

Seizure of person or property, see Miss. R. Civ. P. 64.

JUDICIAL DECISIONS

1. In general.
2. Answer to writ.

1. In general.

Where garnishee was personally served for requisite time before return day, justice of peace on return day could render judgment final. *Busby v. Merchants' & Mfrs.' Bank*, 158 Miss. 843, 131 So. 645 (1931).

This section [Code 1942, § 2787] requires a writ of garnishment to be served as a summons, and where the service is within five days of the return-day the garnishee is not required to answer until the next term. *Alexander v. Lloyd*, 70 Miss. 662, 14 So. 22 (1893).

In such case judgment by default cannot be taken against him before the next term, and the fact that five days have elapsed after service and before entry of the judgment does not change this. *Alexander v. Lloyd*, 70 Miss. 662, 14 So. 22 (1893).

Service of a writ of garnishment not made personally and only two days before the return term cannot support a judg-

ment against the garnishee at the return term. *Alexander v. Equitable Fire Ins. Co.*, 12 So. 706 (Miss. 1893).

2. Answer to writ.

A garnishee purporting to answer a writ of garnishment should disclose whether any indebtedness existed at the time of the service of writ or thereafter and whether there was any property in the hands of the garnishee and also that the answers must be made under oath. *Hussey v. Hussey*, 224 Miss. 856, 82 So. 2d 442 (1955).

In a garnishment action where a letter was written to the court by the garnishee in which he stated that there was no indebtedness due judgment debtor, that fact should have been alleged in garnishee's answer to the writ of garnishment. *Hussey v. Hussey*, 224 Miss. 856, 82 So. 2d 442 (1955).

Purpose of judgment nisi against garnishee is to give garnishee opportunity to answer writ in accordance with statute. *Busby v. Merchants' & Mfrs.' Bank*, 158 Miss. 843, 131 So. 645 (1931).

RESEARCH REFERENCES

ALR. Who may serve writ, summons, or notice of garnishment. 75 A.L.R.2d 1437.

Am Jur. 6 Am. Jur. 2d, Attachment and Garnishment §§ 381-384.

Garnishment, 2 Am. Jur. Pl and Pr Forms (Rev), Attachment and Garnishment, Forms 241 et seq.

2 Am. Jur. Pl & Pr Forms (Rev), Attachment and Garnishment, Forms 211 et seq.

CJS. 38 C.J.S., Garnishment §§ 174-176.

§ 11-35-11. Service of writs of garnishment on government employees.

Service of writs of garnishment upon judgments against any officer or employee of the state, a county, a municipality, any state institution, board, commission or authority shall be effected as follows:

(1) In a case of garnishment against any employee of a state department, agency, board, commission, institution or other authority, the writ shall be served upon the department head, president of the institution or chairman or other presiding officer thereof. In case of a garnishment against a state officer, departmental head, president of an institution, director of a board or other head of any other agency or commission of the state government, the writ shall be served upon the state auditor. In case of a garnishment against the state auditor, the writ shall be served upon the state treasurer, this being the only case in which the state treasurer is served with a writ of garnishment except where a garnishment is against an employee of the state treasurer.

(2) In case of a garnishment against any person who is now or may hereafter be a salaried officer or employee of a county, the writ shall be served upon the clerk of the chancery court of the county, except that in case of garnishment upon a judgment against such clerk the writ shall be served upon the sheriff of the county.

(3) In case of a garnishment against any person who is now or may hereafter be a salaried officer or employee of a county school district or a municipal separate school district, the writ shall be served upon the superintendent of the respective school district, except in the event the garnishment be against such superintendent the writ shall be served upon the president of the board of education or the board of trustees.

(4) In case of a garnishment against an officer or employee of a municipality, the writ shall be served upon the city, town or village clerk.

SOURCES: Codes, 1942, § 2789; Laws, 1936, ch. 321; Laws, 1952, ch. 264; Laws, 1973, ch. 422, § 1, eff from and after passage (approved March 29, 1973).

Editor's Note — Section 7-7-2 provides that the words "State Auditor of Public Accounts," "State Auditor," and "Auditor" appearing in the laws of this state in connection with the performance of Auditor's functions shall mean the State Fiscal Officer.

Section 27-104-6 provides that whenever the term "State Fiscal Officer" appears in any law it shall mean "Executive Director of the Department of Finance and Administration".

Cross References — Seizure of person or property, see Miss. Rule of Civil Proc. 64.

JUDICIAL DECISIONS**1. In general.**

Where a writ of garnishment has been properly served upon a county through its chancery clerk and it appeared that the

county was indebted to the judgment debtor for labor and services performed for the county each month since the date of the service of the writ, it was the duty of

the chancery clerk, representing the board of supervisors, to make proper answer to the writ including the amount of the monthly payments in order that a proper judgment could be obtained in case the amount due under the warrants to be issued to the debtor was above the exemption allowed him by law. *Dunlop Tire &*

Rubber Corp. v. Williams, 251 Miss. 442, 169 So. 2d 783 (1964).

This section [Code 1942, § 2789] does not operate to subject to garnishment fees allowable to a public officer. *Bearry v. Stringfellow*, 247 Miss. 683, 157 So. 2d 491 (1963).

ATTORNEY GENERAL OPINIONS

Miss. Code Section 11-35-11 explicitly subjects salaries of county officials to gar-

nishment, but makes no mention of fees. *Wallace*, Feb. 25, 1993, A.G. Op. #92-0981.

§ 11-35-13. Garnishment against public officer or employee; default judgment against state prohibited.

In no case shall judgment be rendered against the state, a county, a municipality or any state institution, board, commission or authority for default in failing to make answer to a writ served hereunder.

SOURCES: Codes, 1942, § 2790; Laws, 1936, ch. 321.

Cross References — Seizure of person or property, see Miss. R. Civ. P. 64.

§ 11-35-15. Garnishment against state public officer or employee; fee for service of writ.

Any person suggesting and obtaining a writ of garnishment upon a judgment against any person who is an officer or employee of the state shall advance and pay the sum of two dollars which shall be paid by the officer serving the writ of garnishment to the state officer upon whom such writ is directed to be served and such payment shall be retained by such officer as compensation for the additional duty imposed upon him by Sections 11-35-1 and 11-35-11 through 11-35-21, in the capacity of such officer as special agent of the state for service of garnishment writs.

SOURCES: Codes, 1942, § 2791; Laws, 1936, ch. 321.

Joint Legislative Committee Note — Pursuant to Section 1-1-109, the Joint Legislative Committee on Compilation, Revision and Publication of Legislation corrected a typographical error in this section. The dash preceding the words “in the capacity” was deleted. The Joint Committee ratified the correction at its December 3, 1996 meeting.

Cross References — Seizure of person or property, see Miss. R. Civ. P. 64.

§ 11-35-17. Garnishment against county, municipal or other public officer or employee; fee for service of writ.

Any person suggesting and obtaining a writ of garnishment to issue against any officer or employee of a county, municipality or any state institu-

tion, board, commission or authority shall advance and pay the sum of one dollar which shall be paid to the officer upon whom such writ is directed to be served at the time of service of the writ and such sum shall be retained by such officer as compensation for answering the writ of garnishment.

SOURCES: Codes, 1942, § 2792; Laws, 1936, ch. 321.

Cross References — Seizure of person or property, see Miss. R. Civ. P. 64.

ATTORNEY GENERAL OPINIONS

Section 11-35-17 limits to one dollar the amount that a local governmental entity such as a school district may receive for answering a garnishment. Haque, March 15, 1995, A.G. Op. #95-0083.

§ 11-35-19. Garnishment against public officer or employee; failure to answer writ; penalty.

Any person upon whom, in his representative capacity as above set out in Section 11-35-11, there shall be served a writ of garnishment under the provisions of Sections 11-35-1 and 11-35-11 through 11-35-21 shall, if he shall fail or refuse to answer such writ as provided by law in other cases of writs of garnishment and answers thereto forfeit and pay to the plaintiff in the judgment upon which the writ has issued the sum of twenty-five dollars, the same to be recovered in any court of competent jurisdiction.

SOURCES: Codes, 1942, § 2793; Laws, 1936, ch. 321.

Cross References — Seizure of person or property, see Miss. R. Civ. P. 64.

§ 11-35-21. Garnishment against public officer or employee; effect of writ.

Service of writ of garnishment as provided for in Section 11-35-11 shall be effective to bind funds in the hands of the garnishee as in other cases and upon judgment rendered upon the garnishment issue in any court the funds bound, or so much thereof as shall be necessary to pay the judgment upon which garnishment issued and all cost accrued, shall be paid over to the court in which such judgment was rendered and for such payment a properly certified copy of the said judgment in the garnishment proceeding and a certified copy of the bill of costs in such proceedings shall be sufficient warrant and any payment so made shall be charged against the salary or wages of the judgment debtor in the judgment on which writ of garnishment issued.

SOURCES: Codes, 1942, § 2794; Laws, 1936, ch. 321.

Cross References — Seizure of person or property, see Miss. R. Civ. P. 64.

RESEARCH REFERENCES

ALR. Form of judgment against garnishee respecting obligation payable in instalments. 7 A.L.R.2d 680.

Retirement or pension proceeds or annuity as subject to attachment or garnishment. 28 A.L.R.2d 1213.

Right of creditors of life insured as to options or other benefits available to him during his lifetime. 37 A.L.R.2d 268.

Sharecropper's share in crop wholly or partly unharvested as subject to garnish-

ment. 82 A.L.R.2d 858.

Garnishment of salary, wages, or commissions where defendant debtor is indebted to garnishee-employer. 93 A.L.R.2d 995.

Funds deposited in court as subject of garnishment. 1 A.L.R.3d 936.

Joint bank account as subject to attachment, garnishment, or execution by creditor of one of the joint debtors. 11 A.L.R.3d 1465.

§ 11-35-23. Nature and effects of garnishment; property affected.

(1) Except for wages, salary or other compensation, all property in the hands of the garnishee belonging to the defendant at the time of the service of the writ of garnishment shall be bound by and subject to the lien of the judgment, decree or attachment on which the writ shall have been issued. If the garnishee shall surrender such property to the sheriff or other officer serving the writ, the officer shall receive the same and, in case the garnishment issued on a judgment or decree, shall make sale thereof as if levied on by virtue of an execution, and return the money arising therefrom to satisfy the judgment; and if the garnishment issued on an attachment, the officer shall dispose of the property as if it were levied upon by a writ of attachment. And any indebtedness of the garnishee to the defendant, except for wages, salary or other compensation, shall be bound from the time of the service of the writ of garnishment, and be appropriable to the satisfaction of the judgment or decree, or liable to be condemned in the attachment.

(2) The court issuing any writ of garnishment shall show thereon the amount of the claim of the plaintiff and the court costs in the proceedings and should at any time during the pendency of said proceedings in the court a judgment be rendered for a different amount, then the court shall notify the garnishee of the correct amount due by the defendant under said writ.

(3)(a) Except for judgments, liens, attachments, fees or charges owed to the state or its political subdivisions; wages, salary or other compensation in the hands of the garnishee belonging to the defendant at the time of the service of the writ of garnishment shall not be bound by nor subject to the lien of the judgment, decree or attachment on which the writ shall have been issued when the writ of garnishment is issued on a judgment based upon a claim or debt that is less than One Hundred Dollars (\$100.00), excluding court costs.

(b) If the garnishee be indebted or shall become indebted to the defendant for wages, salary or other compensation during the first thirty (30) days after service of a proper writ of garnishment, the garnishee shall pay over to the employee all of such indebtedness, and thereafter, the

garnishee shall retain and the writ shall bind the nonexempt percentage of disposable earnings, as provided by Section 85-3-4, for such period of time as is necessary to accumulate a sum equal to the amount shown on the writ as due the court, even if such period of time extends beyond the return day of the writ. Unless the court otherwise authorizes the garnishee to make earlier payments or releases, the garnishee shall retain all sums collected pursuant to the writ and make only one (1) payment into court at such time as the total amount shown due on the writ has been accumulated, provided that, at least one (1) payment per year shall be made to the court of the amount that has been withheld during the preceding year. Should the employment of the defendant for any reason be terminated with the garnishee, then the garnishee shall not later than fifteen (15) days after the termination of such employment, report such termination to the court and pay into the court all sums as have been withheld from the defendant's disposable earnings. If the plaintiff in garnishment contest the answer of the garnishee, as now provided by law in such cases, and proves to the court the deficiency or untruth of the garnishee's answer, then the court shall render judgment against the garnishee for such amount as would have been subject to the writ had the said sum not been released to the defendant; provided, however, any garnishee who files a timely and complete answer shall not be liable for any error made in good faith in determining or withholding the amount of wages, salary or other compensation of a defendant which are subject to the writ.

(4) Wages, salaries or other compensation as used in this section shall mean wages, salaries, commissions, bonuses or other compensation paid for employment purposes only.

(5) The circuit clerk may, in his or her discretion, spread on the minutes of the county or circuit court, as the case may be, an instruction that all garnishment defendants shall send all garnishment monies to the attorney of record or in the case where there is more than one (1) attorney of record, then to the first-named attorney of record, and not to the clerk. The payment schedule shall be the same as subsection (3)(b) of this section.

(6) All payments made pursuant to a garnishment issued out of the justice court shall be made directly to the plaintiff or to the plaintiff's attorney as indicated by the plaintiff in his or her suggestion for writ of garnishment. The employer shall notify the court and the plaintiff or the plaintiff's attorney when a judgment is satisfied or when the employee is no longer employed by the employer.

SOURCES: Codes, Hutchinson's 1848, ch. 62, art. 7 (8); 1857, ch. 61, art. 314; 1871, § 875; 1880, § 1784; 1892, § 2136; Laws, 1906, § 2343; Hemingway's 1917, § 1938; Laws, 1930, § 1844; Laws, 1942, § 2796; Laws, 1981, ch. 469, § 1; Laws, 1997, ch. 533, § 1; Laws, 2000, ch. 497, § 1; Laws, 2004, ch. 475, § 1, eff from and after July 1, 2004.

Amendment Notes — The 2004 amendment added (6).

Cross References — Exempt property, see §§ 85-3-1 et seq.
Seizure of person or property, see Miss. R. Civ. P. 64.

JUDICIAL DECISIONS

1. In general.
2. Property subject to garnishment.
3. Assignment or transfer prior to garnishment.

1. In general.

In light of the Supremacy Clause, the statutory language of Section 11-35-23(3) must yield to the unequivocal language of the Bankruptcy Code; therefore, "transfers" effected pursuant to writs of garnishment served prior to the 90-day preference period are avoidable as to those wages not yet actually acquired by the debtor. *Taylor v. Mississippi Learning Inst.*, 151 B.R. 772 (Bankr. N.D. Miss. 1993).

A garnishee has the right to surrender garnished property to its true owner or to pay a creditor, but if he surrenders to a person not entitled thereto or pays a garnishor more than the garnishor is entitled to, he is not relieved from liability but will be required to make up any overpayment. *State Farm Mut. Auto. Ins. Co. v. Sampson*, 324 So. 2d 739 (Miss. 1975).

Filing of a motion by the purchaser of the properties of an extinct corporation to quash a writ of garnishment and service on the corporation and to substitute the purchaser as garnishee was the equivalent of valid service of the writ on the purchaser so as to bind money belonging to the judgment debtor in the hands of the purchaser from the time of such appearance. *Mississippi Cottonseed Prods. Co. v. Champion*, 200 Miss. 460, 27 So. 2d 684 (1946).

Service of the writ of garnishment binds any money belonging to the defendant that garnishee may receive between the date of service and the return day of the writ. *Brondum v. Rosenblum*, 151 Miss. 91, 117 So. 363 (1928).

If garnishee paid the judgment debtor his full salary after service of the writ, the garnishee would be liable for such payment, and certainly, if in excess of the legal exemption of the debtor, if any. *Brondum v. Rosenblum*, 151 Miss. 91, 117 So. 363 (1928).

A creditor may proceed to judgment against his debtor notwithstanding the

latter has been garnished, but this being shown the judgment should require execution to be stayed for the amount the defendant has been or is sought to be charged as garnishee. *Yazoo & Miss. V. Ry. v. Fulton*, 71 Miss. 385, 14 So. 271 (1893).

Garnishments bind money received between the date of service and return day, and if the plaintiff wishes a disclosure of this he may demand a fuller answer; in that case a reasonable time must be allowed to amend the answer, even if a continuance results, and one day is not enough if the garnishee's domicile is in a distant county. *Columbus Ins. & Banking Co. v. Hirsh*, 61 Miss. 74 (1883).

2. Property subject to garnishment.

A bank was liable for failure to withhold the funds of a garnishee in a joint construction account in the names of a homeowner and the garnishee contractor, in which the homeowner deposited funds to pay for labor and materials furnished in construction, in spite of the bank's argument that the funds in the account belonged to the homeowner and not to the contractor, where the contractor was free to write checks as he pleased, he determined whether or not each check should be written, and he wrote checks to pay his own debts. *Deposit Guar. Nat'l Bank v. Pete*, 583 So. 2d 180 (Miss. 1991).

A joint account should be garnishable only in proportion to the debtor's ownership of the funds, as to which evidence is admissible to show what portion of the funds is actually owned by each depositor. *Delta Fertilizer, Inc. v. Weaver*, 547 So. 2d 800 (Miss. 1989).

Funds in the possession of the circuit clerk that were received by that office under a mother's garnishment to enforce unpaid child support payments could not be reached in another garnishment proceeding by an entirely disassociated judgment creditor of the mother; moreover, the funds paid to the clerk by the father's employer after garnishment belonged to the child and not to the mother as set out in § 11-35-23. *Lumbermens Mut. Cas. Co. v. Rhodes*, 459 So. 2d 244 (Miss. 1984).

Unliquidated claims for damages are not subject to garnishment. *Goodyear Tire*

& Rubber Co. v. Ross, 201 Miss. 624, 30 So. 2d 66 (1947).

Compensation of deputy tax assessor which is paid by tax assessor himself held exempt from garnishment. Pickle v. McLaughlin, 162 Miss. 693, 139 So. 157 (1932).

A bank deposit in name of an individual followed by "agent" or "trustee" may in action against depositor be garnished, subject to defense that the depositor did not own funds and full disclosure of true owner. Turner v. Nicholson, 151 Miss. 18, 117 So. 329 (1928).

Where a mercantile business was conducted under a name without a sign disclosing the real owners, the property used and acquired therein is subject to the debts of the person so transacting the business, and the proceeds of the policy of fire insurance on goods burned while in such use are liable to the creditors of the party who transacted such business and may be garnished. Meridian Land & Indus. Co. v. J.B. Ormond & Co., 82 Miss. 758, 35 So. 179 (1903).

An unliquidated liability for damages because of tort is not subject to garnishment either at law or in equity. Blair v. Kansas City, M. & B.R. Co., 76 Miss. 478, 24 So. 879 (1899).

3. Assignment or transfer prior to garnishment.

Where husband and wife sold land for cash and purchase money notes which the husband assigned to the wife, and a judgment creditor of the husband garnished the purchaser and collected money on his judgment, the wife had no claim against the judgment creditor for any of the money, so collected. Russell v. Allen, 110 Miss. 722, 70 So. 890 (1916).

A valid assignment of a judgment will defeat a subsequent garnishment of the judgment debtor by a creditor of the assignor, although when the garnishment was served such debtor had no notice of the assignment. Schoolfield v. Hirsh, 71 Miss. 55, 14 So. 528, 42 Am. St. R. 450 (1893).

Where a railroad company, after receiving notice that an employee in this state has assigned his wages, is summoned as garnishee in a suit against such laborer in another state, and, through neglect of the notice, answers admitting the indebtedness, and judgment is rendered against it, the same will be no defense to an action subsequently brought by the assignee of the debt. Illinois Cent. R.R. v. Bryant, 70 Miss. 665, 12 So. 592 (1893).

ATTORNEY GENERAL OPINIONS

All garnishment monies should be paid into court before they are disbursed to the

judgment creditor. Tate, June 3, 1992, A.G. Op. #92-0372.

RESEARCH REFERENCES

ALR. Form of judgment against garnishee respecting obligation payable in instalments. 7 A.L.R.2d 680.

Retirement or pension proceeds or annuity as subject to attachment or garnishment. 28 A.L.R.2d 1213.

Right of creditors of life insured as to options or other benefits available to him during his lifetime. 37 A.L.R.2d 268.

Sharecropper's share in crop wholly or partly unharvested as subject to garnishment. 82 A.L.R.2d 858.

Garnishment of salary, wages, or com-

missions where defendant debtor is indebted to garnishee-employer. 93 A.L.R.2d 995.

Funds deposited in court as subject of garnishment. 1 A.L.R.3d 936.

Joint bank account as subject to attachment, garnishment, or execution by creditor of one of the joint debtors. 11 A.L.R.3d 1465.

Joint Bank Account as Subject to Attachment, Garnishment, or Execution by Creditor of One Joint Depositor. 86 A.L.R.5th 527.

§ 11-35-24. Multiple garnishments.

(1) Where more than one garnishment has been issued against an employee of a garnishee, such garnishee shall comply with the garnishment with which he was first served. In the event more than one (1) garnishment on an employee is received on the same day, the writ of garnishment which is the smallest amount shall be satisfied first. However, in every case, garnishments issued pursuant to court ordered child support shall have first priority, even if previous garnishments are in effect or pending.

(2) Any such conflicting or subsequent garnishments on an employee of the garnishee shall be returned to the court issuing such writ of garnishment with a statement by the garnishee that a previous garnishment is in effect. Such statement shall operate as a stay of the subsequent garnishment until satisfaction of any prior garnishments has been made.

(3) Upon satisfaction of the writ of garnishment in progress, the garnishee shall immediately begin collection of such writ of garnishment with next priority.

(4) Good faith compliance with this section shall release the garnishee from any liability for failure of compliance with this section.

SOURCES: Laws, 1981, ch. 469, § 5, eff from and after passage (approved April 7, 1981).

Cross References — Seizure of person or property, see Miss. R. Civ. P. 64.

RESEARCH REFERENCES

Am Jur. 6 Am. Jur. 2d, Attachment and Garnishment §§ 490 et seq. **CJS.** 38 C.J.S., Garnishment § 205.

§ 11-35-25. Answer of the garnishee.

(1) Every person duly summoned as a garnishee shall answer on oath as to the following particulars, viz.:

(a) Whether he be indebted to the defendant or were so indebted at the time of the service of the writ on him, or have at any time since been so indebted; and, if so indebted, in what sum, whether due or not, and when due or to become due, and how the debt is evidenced, and what interest it bears;

(b) What effects of the defendant he has or had at the time of the service of the writ on him, or has had since, in his possession or under his control;

(c) Whether he knows or believes that any other person is indebted to the defendant; and, if so, whom, and in what amount, and where he resides; and

(d) Whether he knows or believes that any other person has effects of the defendant in his possession or under his control; and, if so, whom, and where he resides.

(2) In addition to answering as to the particulars in subsection (1) of this section, each person duly summoned as a garnishee in any case in which he be indebted to the defendant for wages, salary or other compensation shall

answer on oath as to whether the defendant is an employee of the garnishee and, if so, the time interval between pay periods of the defendant including any specific day of a week or month on which such defendant is regularly paid.

SOURCES: Codes, Hutchinson's 1848, ch. 56, art. 4 (6), ch. 62, art. 7 (1); 1857, ch. 52, art. 4, ch. 61, art. 313; 1871, §§ 874, 1430; 1880, §§ 1783, 2422; 1892, § 2135; Laws, 1906, § 2342; Hemingway's 1917, § 1937; Laws, 1930, § 1843; Laws, 1942, § 2788; Laws, 1981, ch. 469, § 2, eff from and after passage (approved April 7, 1981).

Cross References — Property exempt from seizure under execution or attachment, see §§ 85-3-1 et seq.

Seizure of person or property, see Miss. R. Civ. P. 64.

JUDICIAL DECISIONS

1. In general.
2. Defects in answer.
3. Debtor's discharge in bankruptcy.
4. Setoff.

1. In general.

A garnishee which failed to file an answer to a writ of garnishment as required by § 11-35-25 and instead paid \$10 per week of the judgment debtor's salary directly to the attorney for the judgment holder was liable to the debtor for monies wrongfully withheld after expiration of the judgment where, although the judgment and execution thereon had expired after seven years as provided in §§ 15-1-3, 15-1-43 and although the judgment holder had failed to file another suit on the judgment prior to the expiration of the seven years as required by § 15-1-47 to extend the judgment lien, the garnishee continued to pay the \$10 per week to the judgment holder for two years after the judgment had lapsed. *Anderson-Tully Co. v. Brown*, 383 So. 2d 1389 (Miss. 1980).

A default judgment against a garnishee, who instead of filing a formal answer wrote the clerk of the court a letter which the clerk failed to file or note on the docket, is properly set aside upon the court's attention being called to the letter. *Thompson v. Thompson*, 236 Miss. 31, 109 So. 2d 530 (1959).

A garnishee purporting to answer a writ of garnishment should disclose whether any indebtedness existed at the time of the service of writ or thereafter and whether there was any property in the hands of the garnishee and also that the

answers must be made under oath. *Hussey v. Hussey*, 224 Miss. 856, 82 So. 2d 442 (1955).

In a garnishment action where a letter was written to the court by the garnishee in which he stated that there was no indebtedness due judgment debtor, that fact should have been alleged in garnishee's answer to the writ of garnishment. *Hussey v. Hussey*, 224 Miss. 856, 82 So. 2d 442 (1955).

As distinguished from garnishee in chancery attachment, garnishee in law garnishment must answer whether it owes, or has in its possession effects of, nonresident defendant, and also must answer whether it knows or believes that any other person is indebted to, or has in his possession effects of such nonresident, and, if so, whom, in what amounts, and where he resides; and garnishee, to protect himself, is also under duty to raise question of exemption of the debtor-defendant, as well as the validity of the judgment on which the garnishment is based. *Mid-South Paving Co. v. Trinidad Asphalt Mfg. Co.*, 197 Miss. 751, 21 So. 2d 646 (1945), error overruled, 197 Miss. 751, 22 So. 2d 497 (1945).

Judgment creditor may, if facts justify it, suggest any one or more of the four grounds for garnishment herein enumerated. *Universal Life Ins. Co. v. Catchings*, 169 Miss. 26, 152 So. 817 (1934).

Garnishee on return day, if desiring to interpose defense to writ, should file answer setting up defense and not motion to quash writ. *Busby v. Merchants' & Mfrs.' Bank*, 158 Miss. 843, 131 So. 645 (1931).

The answer of the garnishee should be a substantial compliance with this statute. *Arky v. Cameron*, 92 Miss. 632, 46 So. 54 (1908), on suggestion of error, 92 Miss. 636, 46 So. 170 (1908).

Where a railroad company contracts with one to build its roadbed and the contractor sublets a part of the work, and the employees of the subcontractor garnish the railroad company, and where the company answers stating the facts and pays the amount of money into the court due the contractor, the defense is complete and the company fully acquitted. *Herrin v. Warren & Mobley*, 61 Miss. 509 (1884).

The garnishees being partners, the answer of one admitting liability is binding on the partnership. *Anderson v. Wanzer*, 6 Miss. (5 Howard) 587, 35 Am. Dec. 170 (1841).

2. Defects in answer.

Answer of garnishees admitting indebtedness due but alleging that such indebtedness was subject to certain attachments was too vague and indefinite to raise an issue relative thereto. *Mechanics' & Traders' Ins. Co. v. Butler*, 115 Miss. 476, 76 So. 521 (1917).

If the garnishee file an answer endeavoring to deny liability, though the answer be inartificially drawn or fail to conform strictly to the statute, the plaintiff will not

be permitted to strike it from the files and take judgment for his debt, he must except to the answer. *Little v. Nelson*, 61 Miss. 672 (1884).

3. Debtor's discharge in bankruptcy.

Garnishee's effort to set up judgment debtor's discharge in bankruptcy held not answer to garnishment writ. *England Motor Co. v. Greenville Com. Body Co.*, 163 Miss. 22, 138 So. 591 (1932).

In garnishment proceeding, garnishee had no authority to set up judgment debtor's bankruptcy proceeding, such defense being personal to the debtor. *England Motor Co. v. Greenville Com. Body Co.*, 163 Miss. 22, 138 So. 591 (1932).

Where garnishee attempted to set up debtor's discharge in bankruptcy, and judgment was rendered against garnishee, court should have permitted garnishee at same term to file answer in accordance with facts. *England Motor Co. v. Greenville Com. Body Co.*, 163 Miss. 22, 138 So. 591 (1932).

4. Setoff.

The strict rule of law as to pleading setoff in an ordinary action does not apply where the garnishee pleads a setoff to the debt he owes a judgment debtor. *Melton Hdwe. Co. v. Heidelberg*, 91 Miss. 598, 44 So. 857, 15 Am. Ann. Cas. 704 (1907).

RESEARCH REFERENCES

ALR. Garnishee's pleading, answering interrogatories, or the like, as affecting his right to assert court's lack of jurisdiction. 41 A.L.R.2d 1093.

Am Jur. 6 Am. Jur. 2d, Attachment and Garnishment §§ 389 et seq.

2 Am. Jur. Pl & Pr Forms (Rev), Attachment And Garnishment, Forms 241 et seq.; Forms 271 et seq.

CJS. 38 C.J.S., Garnishment §§ 241 et seq.

§ 11-35-27. Garnishee's answer; time.

Garnishees shall, in all cases in the circuit or chancery court, answer on the first day of the return term, and, in the courts of justices of the peace, they shall answer by noon on the return day of the writ, unless the court, for cause shown, shall grant further time; and, if upon the answer of any garnishee, it appear that there is any estate of the defendant in the hands of any person not summoned, an alias writ may at once be issued, to be levied on the property in the hands of such person, or he may be summoned as garnishee.

SOURCES: Codes, 1857, ch. 52, art. 26; 1871, § 1443; 1880, § 2444; 1892, § 2140; Laws, 1906, § 2347; Hemingway's 1917, § 1942; Laws, 1930, § 1848; Laws, 1942, § 2800.

Editor's Note — Pursuant to Miss. Const., Art. 6, § 171, all references in the Mississippi Code to justice of the peace shall mean justice court judge.

Cross References — Seizure of person or property, see Miss. R. Civ. P. 64.

JUDICIAL DECISIONS

1. In general.

A default judgment entered against garnishee on return day of writ was irregular on its face, garnishee being entitled to entire return day in which to make his answer, and it should have been set aside upon application duly filed at any time before final adjournment of the term of court at which it was entered. *Rogers v. Ziller*, 48 So. 2d 476 (Miss. 1950).

Answer of garnishee must be filed in justice court within the time prescribed and on failure to do so cannot be filed in the circuit court on appeal. *Gulf & S.I.R.R. v. Ramsey*, 98 Miss. 863, 54 So. 440 (1911);

Southern Lumber & Mfg. Co. v. Mallett, 101 Miss. 135, 57 So. 548 (1912); *Jamison v. H.K. Mulford Co.*, 108 Miss. 639, 67 So. 148 (1915).

The garnishee may answer at any time after service of the writ and need not wait until the beginning of the term. The plaintiff, if the answer be filed before the return day, may require an additional answer. *Columbus Ins. & Banking Co. v. Hirsh*, 61 Miss. 74 (1883).

Garnishees may answer before the term begins to which the writ is returnable. *Columbus Ins. & Banking Co. v. Hirsh*, 61 Miss. 74 (1883).

RESEARCH REFERENCES

Am Jur. 2 Am. Jur. Pl & Pr Forms (Rev), Attachment And Garnishment, Forms 241 et seq.; Forms 271 et seq.

§ 11-35-29. Judgment on answer.

If the garnishee admits indebtedness to or the possession of effects of the defendant, and he have not paid or delivered the same to the sheriff, judgment may be rendered against him in favor of the plaintiff for the amount of the debt admitted, or for the property, or the value thereof (to be assessed if necessary), admitted to be in his possession; but the judgment shall not be for a greater sum than the plaintiff's demand.

SOURCES: Codes, 1892, § 2137; Laws, 1906, § 2344; Hemingway's 1917, § 1939; Laws, 1930, § 1845; Laws, 1942, § 2797.

Joint Legislative Committee Note — Pursuant to Section 1-1-109, the Joint Legislative Committee on Compilation, Revision and Publication of Legislation corrected a typographical error in this section. The word "admit" was changed to "admits". The Joint Committee ratified the correction at its December 3, 1996 meeting.

Cross References — Seizure of person or property, see Miss. R. Civ. P. 64.

JUDICIAL DECISIONS

1. In general.

Where an answer in a garnishment proceeding was filed which did not raise an issue of fact, and the plaintiff in garnishment did not contest the extent of the discovery or the truthfulness of the answer, judgment on the answer was properly entered. *State Farm Mut. Auto. Ins. Co. v. Sampson*, 324 So. 2d 739 (Miss. 1975).

Where a fire insurance company, being garnished, filed a sworn certificate which is silent as to any indebtedness to defendant in attachment, but states that it had issued a policy to claimant of the property attached, which had burned, but that the policy had been avoided and nothing is due assured, this shows an attempt to comply with the summons, and it is error, without notice to the garnishee and opportunity to amend, to render judgment as for want of an answer. *Threefoot v. Whittle*, 71 Miss. 392, 15 So. 120 (1894).

A judgment against a garnishee does not operate as a transfer to the garnishing creditor of the debt owing by the garnishee, nor until payment thereof is it a bar to a suit against the garnishee by the defendant, his creditor. *Yazoo & Miss. V. Ry. v. Fulton*, 71 Miss. 385, 14 So. 271 (1893).

A creditor may proceed to judgment against his debtor notwithstanding the latter has been garnished in respect to the debt sued for, but this being shown, the judgment should require execution to be stayed for the amount for which the defendant has been or is sought to be charged as garnishee. *Yazoo & Miss. V. Ry. v. Fulton*, 71 Miss. 385, 14 So. 271 (1893).

Where a judgment against a garnishee in attachment shows that the defendant in the suit consented to such judgment the garnishee cannot have it reversed on the grounds that there was no precedent judgment against the defendant. *Daniel v. Daniels & Co.*, 62 Miss. 352 (1884).

Where a judgment recites that the garnishee admitted the indebtedness for which it was rendered, it is not error that the garnishee was not served with the writ and no answer by him appears on the record brought to the Supreme Court. *Daniel v. Daniels & Co.*, 62 Miss. 352 (1884).

The judgment against the garnishee must not be larger than the judgment against the original defendant. *Hoffman v. Levi Simon & Co.*, 52 Miss. 302 (1876).

§ 11-35-31. Garnishee's failure to answer.

If a garnishee, personally summoned, shall fail to answer as required by law, or if a scire facias on a judgment nisi be executed on him, and he fail to show cause for vacating it, the court shall enter a judgment against him for the amount of plaintiff's demand; and execution shall issue thereon, provided, however, that the garnishee may suspend the execution by filing a sworn declaration in said court showing the property and effects in his possession belonging to the debtor, and his indebtedness to the debtor, if any, or showing that there be none, if that be true; and by such act and upon a hearing thereon, the garnishee shall limit his liability to the extent of such property and effects in his hands, and such indebtedness due by him to the debtor, plus court costs and reasonable attorney's fees of the judgment creditor in said garnishment action.

SOURCES: Codes, Hutchinson's 1848, ch. 56, art. 4 (19), ch. 62, art. 7 (2); 1857, ch. 52, art. 25; 1871, § 1442; 1880, § 2446; 1892, § 2138; Laws, 1906, § 2345;

Hemingway's 1917, § 1940; Laws, 1930, § 1846; Laws, 1942, § 2798; Laws, 1966, ch. 364, § 1, eff from and after passage (approved May 20, 1966).

Cross References — Seizure of person or property, see Miss. R. Civ. P. 64.

JUDICIAL DECISIONS

1. In general.
2. Construction and application.

1. In general.

Where a sworn declaration is filed pursuant to § 11-35-31 prior to execution on the default judgment, a defaulting garnishee suffers only liability for attorney's fees and court costs and does not waive its ability to assert defenses on the merits. *Wayne Lee's Grocery & Mkt., Inc. v. Bay St. Louis, Miss. Com. Properties Dev. Corp.*, 580 So. 2d 1295 (Miss. 1991).

The penalty for failure to answer a writ of garnishment in a timely manner is bearing the expense of putting the creditor in the same position that it would have enjoyed had a timely answer been filed. In other words, the defaulting garnishee must pay over any amounts which would have been caught by the garnishment and pay costs and attorney's fees. *Wayne Lee's Grocery & Mkt., Inc. v. Bay St. Louis, Miss. Com. Properties Dev. Corp.*, 580 So. 2d 1295 (Miss. 1991).

Right of garnishee to vacate default judgment, allow answer to be filed and to obtain hearing to determine extent of property and effects in possession of garnishee is as provided in garnishment statute (§ 11-35-31); inconsistent provisions of Mississippi Rule of Procedure 60 are inapplicable. *Federal Sav. & Loan Ins. Corp. v. S. & W. Constr. Co.*, 475 So. 2d 145 (Miss. 1985).

In a garnishment action by a judgment creditor, in an automobile accident case against the insurer of an automobile which had been driven by the uninsured judgment debtor, the court did not abuse its discretion in setting aside a default judgment against the insurer, where at the same term of court at which the default judgment was rendered, the insurer was able to show cause for vacating the default judgment, and the court did in fact vacate that judgment. *Saint Paul Fire & Marine Ins. Co. v. Arnold*, 254 So. 2d 872 (Miss. 1971).

A garnishee purporting to answer a writ of garnishment should disclose whether any indebtedness existed at the time of the service of writ or thereafter and whether there was any property in the hands of the garnishee and also that the answers must be made under oath. *Hussey v. Hussey*, 224 Miss. 856, 82 So. 2d 442 (1955).

Where garnishee on return day under scire facias after judgment nisi did not file answer, no issue was presented, warranting exclusion of evidence setting up defense. *Busby v. Merchants' & Mfrs.' Bank*, 158 Miss. 843, 131 So. 645 (1931).

When a person is summoned as garnishee and fails to appear and answer the writ, the law presumes that he admits the debt to be due equal to the amount of the demand and on this assumption permits a judgment to be taken against him. *Little v. Nelson*, 61 Miss. 672 (1884).

2. Construction and application.

Response to a writ of garnishment, claiming a party was not indebted at the time the writ issued, if properly asserted, would have unquestionably entitled the party to relief from the garnishment without the need for a Miss. R. Civ. P. 60(b) inquiry. *Bechtel Power Corp. v. MMC Materials, Inc.*, 830 So. 2d 672 (Miss. Ct. App. 2002), cert. denied, 830 So. 2d 1251 (Miss. Ct. App. 2002).

In order to suspend the execution of the writ of garnishment, a sworn declaration must be filed in the court before the garnishee has answered and paid into court the funds caught by the garnishment; one cannot wait to file a declaration to suspend the execution until the execution has been completed, the answer filed, the funds paid into court and disbursed by the clerk to the judgment creditor. *Triplett v. Brunt-Ward Chevrolet, Oldsmobile, Pontiac, Buick, Cadillac, GMC Trucks, Inc.*, 812 So. 2d 1061 (Miss. Ct. App. 2001).

A garnishee who failed to answer a writ of garnishment was liable only for attor-

ney's fees and costs where the judgment debtor who was employed by the garnishee had no non-exempt disposable earnings which were not subject to prior garnishments. *Wayne Lee's Grocery & Mkt., Inc. v. Bay St. Louis, Miss. Com. Properties Dev. Corp.*, 580 So. 2d 1295 (Miss. 1991).

Garnishee properly answered writ of garnishment under Mississippi Code § 11-35-31 where garnishee's response invoked her marital privilege, even though response set forth none of information sought by creditor. *Fidelity Nat'l Bank v. Center Mgt., Inc.*, 585 F. Supp. 1406 (S.D. Miss. 1984).

A garnishee, even though the subject of an otherwise valid default judgment following service of the writ of garnishment and failure to answer, may nevertheless, under § 11-35-31, suspend execution and enforcement of that judgment at any time before completion of the execution of the enforcement process thereon. *First Miss. Nat'l Bank v. KLH Indus., Inc.*, 457 So. 2d 1333 (Miss. 1984).

In order to suspend the execution of a writ of garnishment, the sworn declaration required by the statute must be filed in the court before the garnishee has answered and paid into court the funds caught by the garnishment. *Haley v. State*, 404 So. 2d 320 (Miss. 1981).

A default judgment against a garnishee failing to answer may not be set aside at a term of court following that of its rendition because the garnishee made an attempt in good faith to answer by preparing one which through mistake was not forwarded to the clerk of the court. *George v. Standard Oil Co.*, 239 Miss. 712, 124 So. 2d 858 (1960).

In a garnishment action where a letter was written to the court by the garnishee in which he stated that there was no indebtedness due judgment debtor, that fact should have been alleged in garnishee's answer to the writ of garnishment. *Hussey v. Hussey*, 224 Miss. 856, 82 So. 2d 442 (1955).

Where as to a writ of garnishment issued to nonresident express company doing business in the state, the garnishee had the right to raise legal question as to jurisdiction of the court and also the rea-

sonableness of its refusal to answer certain questions, the action of the trial court in striking out the answer of the garnishee and rendering judgment against him without first ordering a hearing, and ordering the garnishee to answer the questions and then to give it ample time within which to do so, was reversible error. *Keathley v. Hancock*, 212 Miss. 1, 53 So. 2d 29 (1951).

Default judgment against garnishee will not be set aside for failure of garnishee's agent to file its answer to writ of garnishment. *Campbell v. Yazoo & Miss. V. Ry. Co.*, 199 Miss. 309, 24 So. 2d 531 (1946).

Where garnishee attempted to set up debtor's discharge in bankruptcy, and judgment was rendered against garnishee, court should have permitted garnishee at same term to file answer in accordance with facts. *England Motor Co. v. Greenville Com. Body Co.*, 163 Miss. 22, 138 So. 591 (1932).

Judgment setting aside judgment in garnishment proceeding at subsequent term on undisposed of motion made during term at which judgment was rendered was not void, and clerk was improperly enjoined from setting aside judgment. *Meggett v. Greenville Com. Body Co.*, 161 Miss. 370, 137 So. 187 (1931).

Where railroad company, garnished on valid judgment against its employee, defaulted in answering by time fixed by law and judgment was rendered against it, which it paid, it could set off amount thereof against a debt to its employee where such money was not exempt from execution or garnishment. *Gulf, M. & N.R. Co. v. Sanders*, 143 Miss. 492, 108 So. 184 (1926).

A judgment by default taken against a garnishee on the second day of the term of court to which it was returnable, should be set aside when it appears that the garnishee failed to answer because of a misleading statement of the debtor that the controversy had been settled. *Miller v. Port Gibson Brick Mfg. Co.*, 78 Miss. 170, 28 So. 807 (1900).

Where an insurance company being garnished files its sworn certificate that it had issued a policy to a claimant on the property attached which had burned, but

that the policy has been avoided and nothing is due the assured, which certificate is silent as to any indebtedness to the defendant in attachment, this shows an attempt to comply with the summons, and it

is error, without notice to the garnishee and opportunity to amend, to render judgment as for want of an answer. *Threefoot v. Whittle*, 71 Miss. 392, 15 So. 120 (1894).

ATTORNEY GENERAL OPINIONS

If particular judgment debtor was not employed by garnishee and garnishee did not owe or have possession of that judgment debtor's property then there would

be no liability for garnishee that followed provisions of statute. Gibson, April 12, 1990, A.G. Op. #90-0220.

RESEARCH REFERENCES

ALR. Validity of statute or rule providing for arbitration of fee disputes between attorneys and their clients. 17 A.L.R.4th 993.

Attorneys' fees: cost of services provided by paralegals or the like as compensable element of award in state court. 73 A.L.R.4th 938.

§ 11-35-33. Garnishee may claim exemptions.

Any garnishee who answers admitting an indebtedness, or the possession of property due or belonging to the defendant, may show by his answer that he is advised and believes that the defendant does or will claim the debt or property, or some part thereof, as exempt from garnishment, levy, or sale. Upon the filing of such answer, the clerk or justice of the peace shall issue a summons or make publication, if defendant be shown by oath to be absent from the state, for the defendant, notifying him of the garnishment and the answer, and requiring him to assert his right to the exemption. Proceedings against the garnishee shall be stayed until the question of the debtor's right to the exemption be determined. If the defendant fail to appear, judgment by default may be taken against him, adjudging that he is not entitled to the property or debt as exempt; but if he appear, the court shall, on his motion, cause an issue to be made up and tried between him and the plaintiff.

SOURCES: Codes, 1892, § 2139; Laws, 1906, § 2346; Hemingway's 1917, § 1941; Laws, 1930, § 1847; Laws, 1942, § 2799.

Editor's Note — Pursuant to Miss. Const., Art. 6, § 171, all references in the Mississippi Code to justice of the peace shall mean justice court judge.

Cross References — Exemption of income or principal from an employee trust plan, see § 71-1-43.

Exempt property, see §§ 85-3-1 et seq.

Officer's bond of indemnity, see § 85-3-5.

Seizure of person or property, see Miss. R. Civ. P. 64.

JUDICIAL DECISIONS

1. In general.
2. Failure to suggest exemption.
3. Waiver of exemption.

1. In general.

The statute does not require the garnishee to suggest in its answer any possi-

bility that funds are exempt as to a joint account holder to the account subject to garnishment; it only requires the garnishee to raise the question of an exemption as to the judgment debtor if there is a reasonable basis to think the judgment debtor intended to make such a claim. *Triplett v. Brunt-Ward Chevrolet, Oldsmobile, Pontiac, Buick, Cadillac, GMC Trucks, Inc.*, 812 So. 2d 1061 (Miss. Ct. App. 2001).

Where a judgment debtor is only entitled to notice of the garnishment action if the garnishee suggests exemptions under this section, the notice provisions of M.R.C.P. 55 are inconsistent with the statutes, and are not applicable. *Folse v. Stennett-Yancey*, 757 So. 2d 989 (Miss. 2000).

Where a judgment creditor failed to join issue raised in answers filed both by the judgment debtor and garnishee as to whether the indebtedness owing by the garnishee to the judgment debtor was dischargeable in bankruptcy, chancery court was without jurisdiction to render final orders in the garnishment proceedings. *Hunter v. Commercial Sec. Co.*, 237 Miss. 41, 113 So. 2d 127 (1959).

On suggestion of exemption, all proceedings should be stayed pending notice to judgment debtor and determination of that issue. *Brondum v. Rosenblum*, 151 Miss. 91, 117 So. 363 (1928).

Failure to issue summons for garnishee after securing writ of certiorari within proper time, after claim of exemption had been allowed, and issuing summons only for judgment defendant, held not to bar proceedings as to garnishee, since petition and bond were filed and writ issued within statutory limits. *Citizens' Bank v. Ratliff & Bradshaw*, 142 Miss. 866, 108 So. 146 (1926).

Judgment creditor, having issued certiorari within statutory limit after allowance of exemption on return to writ of garnishment, held not estopped to prosecute writ because garnishee had paid out money in its hands before filing petition. *Citizens' Bank v. Ratliff & Bradshaw*, 142 Miss. 866, 108 So. 146 (1926).

On suggestion of an exemption in the answer the court must summon the exemptioners. *Illinois Cent. R.R. v. Badley*, 94 Miss. 437, 49 So. 114 (1909).

As to the rule governing the exemption from garnishment of the wages of a laborer or other person who is the head of a family working for wages, see *Chapman v. Berry*, 73 Miss. 437, 18 So. 918, 55 Am. St. R. 546 (1895).

Exemption of the wages of a laborer under Mississippi law from a debt due in the state to a resident of the state cannot be defeated by a garnishment against a railroad, indebted to such laborer, in a foreign state where such railroad also has a line, and the court will give effect to the exemption laws, regardless of the laws of the foreign state. *Illinois Cent. R.R. v. Smith*, 70 Miss. 344, 12 So. 461, 35 Am. St. R. 651 (1892), overruled on other grounds, *Southern Pac. R.R. v. A.J. Lyon & Co.*, 54 So. 784 (Miss. 1911).

2. Failure to suggest exemption.

As distinguished from garnishee in chancery attachment, garnishee in law garnishment must answer whether it owes, or has in its possession effects of, nonresident defendant, and also must answer whether it knows or believes that any other person is indebted to, or has in his possession effects of such nonresident, and, if so, whom, in what amounts, and where he resides; and garnishee to protect himself, is also under duty to raise question of exemption of the debtor-defendant as well as the validity of the judgment on which the garnishment is based. *Mid-South Paving Co. v. Trinidad Asphalt Mfg. Co.*, 197 Miss. 751, 21 So. 2d 646 (1945), error overruled, 197 Miss. 751, 22 So. 2d 497 (1945).

In action by employee against railroad company to recover wages, if exemption from garnishment is not pleaded or proven in record, Supreme Court on appeal cannot take cognizance thereof so as to defeat company's claim of right to set off amount which it had paid under garnishment in action against employee. *Gulf, M. & N.R. Co. v. Sanders*, 143 Miss. 492, 108 So. 184 (1926).

On failure of garnishee to suggest the name of a claimant to the debt judgment only can be rendered against the garnishee. *Russell v. Allen*, 110 Miss. 722, 70 So. 890 (1916); *Howell v. Moss Point Furn. Co.*, 136 Miss. 399, 101 So. 559 (1924).

A garnishee who pays a judgment rendered against it as such and takes an assignment of the judgment on which the writ was issued, remains liable to the judgment debtor where the debt garnished was exempt as the monthly wages of the head of a family, and the garnishee has failed to suggest the claim of exemption. *City of Laurel v. Turner*, 80 Miss. 530, 31 So. 965 (1902).

Exemptions are highly favored by the

law and their protection may not be defeated by the intention or the neglect of the garnishee. *City of Laurel v. Turner*, 80 Miss. 530, 31 So. 965 (1902).

3. Waiver of exemption.

Defendant in garnishment proceedings, voluntarily appearing and failing to submit claim of exemption, waived his right to do so. *Blaylock v. J. Rubel & Co.*, 119 So. 503 (Miss. 1928).

RESEARCH REFERENCES

ALR. Admissibility of hearsay evidence as to comparable sales of other land as basis for expert's opinion as to land value. 12 A.L.R.3d 1064.

§ 11-35-35. Stay if debt not yet due; delivery of goods or chattels to sheriff.

If a garnishee admit an indebtedness not then due, execution shall be stayed until its maturity; and if he admit the possession of goods or chattels of the defendant, such goods or chattels shall be delivered to the sheriff; but, in attachment cases, the garnishee may replevy the property by giving a bond for the same, as the defendant in attachment may do, and subject to the same proceedings and liabilities.

SOURCES: Codes, 1857, ch. 52, art. 27; 1871, § 1444; 1880, § 2445; 1892, § 2141; Laws, 1906, § 2348; Hemingway's 1917, § 1943; Laws, 1930, § 1849; Laws, 1942, § 2801.

Cross References — Attachment for a debt not due, see § 11-33-35.
Seizure of person or property, see Miss. R. Civ. P. 64.

JUDICIAL DECISIONS

1. In general.

If a garnishee answers admitting an indebtedness not due, execution will be stayed until maturity. If he denies the indebtedness and on a trial it is found that he owes a debt not then due, judgment will be stayed as if the fact had been confessed in the answer. *Red v. Powers*, 69

Miss. 242, 13 So. 586 (1891).

Where judgment is taken upon an answer, which is not contested, admitting a debt not due, it should stay the execution; but if it fail to do so execution cannot be rightfully issued until the debt is due. *Anderson v. Wanzer*, 6 Miss. (5 Howard) 587, 35 Am. Dec. 170 (1841).

§ 11-35-37. Garnishee protected in certain cases.

If a garnishee shall pay over or deliver, in pursuance of the judgment or process of the court, any money or property belonging to the defendant, before notice of sale, assignment, or transfer thereof by the defendant to any other person, such garnishee shall not thereafter be liable for the debt or property to the vendee or assignee thereof.

SOURCES: Codes, Hutchinson's 1848, ch. 62, art. 7 (5); 1857, ch. 52, art. 36; 1871, § 1453; 1880, § 2447; 1892, § 2142; Laws, 1906, § 2349; Hemingway's 1917, § 1944; Laws, 1930, § 1850; Laws, 1942, § 2802.

Cross References — Seizure of person or property, see Miss. R. Civ. P. 64.

JUDICIAL DECISIONS

1. In general.

The mere pendency of a garnishment against the payee in a note does not ex-

empt him from liability in an action on the note. *Brahan v. First Nat'l Bank*, 72 Miss. 266, 16 So. 203 (1894).

§ 11-35-39. Garnishee may plead that judgment is void.

The garnishee may plead that the judgment under which the writ of garnishment was issued is void, and if his plea be sustained, no judgment shall be rendered against him.

SOURCES: Codes, 1906, § 2350; Hemingway's 1917, § 1945; Laws, 1930, § 1851; Laws, 1942, § 2803.

Cross References — Seizure of person or property, see Miss. R. Civ. P. 64.

JUDICIAL DECISIONS

1. In general.

Where at the hearing on a writ of garnishment issued against an automobile liability insurer the claimed policy of insurance was not introduced in evidence or made a part of the record, it would be impossible to determine whether it covered either the driver or the automobile allegedly responsible for the collision or the damage resulting therefrom, and for this reason it was error to grant judgment on the garnishment writ. *State Farm Mut. Auto. Ins. Co. v. Stewart*, 209 So. 2d 438 (Miss. 1968).

Reversal of the main judgment annuls a judgment against a garnishee. *Grain Dealers Mut. Ins. Co. v. Langlinais*, 240 Miss. 258, 126 So. 2d 869 (1961).

As distinguished from garnishee in chancery attachment, garnishee in a law garnishment must answer whether it owes, or has in its possession effects of, nonresident defendant, and also must answer whether it knows or believes that any other person is indebted to, or has in his possession effect of such nonresident, and, if so, whom, in what amounts, and where he resides; and garnishee, to protect himself, is also under duty to raise

question of exemption of the debtor-defendant as well as the validity of the judgment on which the garnishment is based. *Mid-South Paving Co. v. Trinidad Asphalt Mfg. Co.*, 197 Miss. 751, 21 So. 2d 646 (1945), error overruled, 197 Miss. 751, 22 So. 2d 497 (1945).

Notation on declaration whereby defendant's attorney waived process and entered appearance during term, without attestation by clerk of court, held not to authorize default judgment, and therefore such judgment furnished no basis for recovery from garnishee. *Industrial Inv. Co. v. Standard Life Ins. Co.*, 170 Miss. 138, 149 So. 883 (1933).

A judgment by default against a garnishee cannot be sustained where the original judgment was void and will be reversed on appeal. *Copiah Hdwe. Co. v. Meteor Motor Car Co.*, 136 Miss. 274, 101 So. 375 (1924), error overruled, 136 Miss. 284, 101 So. 579 (1924).

The validity of judgment against a garnishee is dependent upon the validity of the judgment in the main action. *Moody & Williams v. Dye*, 125 Miss. 770, 88 So. 332 (1921).

To attack a judgment against a gar-

nishee the fact that the judgment is void should be specially pleaded. *Russell v. Allen*, 110 Miss. 722, 70 So. 890 (1916).

Entrance of irregular return on writ which does not render it void. *Reeves Grocery Co. v. Thompson*, 105 Miss. 729, 63 So. 187 (1913).

A garnishment upon a judgment

against the "Southern Insurance Company of New Orleans" is not void and the garnishee cannot escape liability because the record does not show whether the defendant in the judgment is a corporation, natural person, or a partnership. *Winner v. McMullan*, 77 Miss. 662, 27 So. 618 (1900).

§ 11-35-41. Garnishee may compel interpleader.

When a garnishee, by his answer or by affidavit at any time before final judgment against him, or after such judgment if he had no such notice before the judgment was rendered, shall show that he has been notified that another person claims title to or an interest in the debt or property, which has been admitted by him, or found on a trial to be due or to be in his possession, the court shall suspend all further proceedings, and cause a summons to issue or publication to be made for the person so claiming to appear and contest with the plaintiff the right to such money, debt, or property. In such case, if the answer admit an indebtedness, and the garnishee pay the money into court, he shall thereupon be discharged from liability to either party for the sum so paid. And whenever such garnishee shall by said answer or affidavit show that he has been notified that another person claims title to or interest in such debt or property, it shall be lawful for such third person of his own motion to come in and claim the debt or property, and the claim shall be tried as other claimant's issues are tried whether summons or publication has been made to bring him in or not.

SOURCES: Codes, 1857, ch. 52, art. 34; 1871, § 1451; 1880, § 2449; 1892, § 2143; Laws, 1906, § 2351; Hemingway's 1917, § 1946; Laws, 1930, § 1852; Laws, 1942, § 2804.

Cross References — Interpleader proceedings, see Miss. R. Civ. P. 22.
Seizure of person or property, see Miss. R. Civ. P. 64.

JUDICIAL DECISIONS

1. In general.
2. Right of interpleader.
3. —After judgment.
4. Duties and liabilities of garnishee.
5. —Payment into court.
6. Procedure.

1. In general.

A federal interpleader action brought in its own jurisdiction by a nonresident judgment debtor of an insolvent Mississippi judgment creditor was dismissed where, under Code 1942, §§ 1362 and 2804, ample procedures existed for the protection of the judgment debtor's rights in Missis-

siippi. *Hansen v. Mathews*, 424 F.2d 1205 (7th Cir. Wis. 1970), cert. denied, 397 U.S. 1057, 90 S. Ct. 1404, 25 L. Ed. 2d 675 (1970).

One to whom accounts have been assigned as security may, upon recovering judgment against assignor, garnish account-debtors. *Ralston Purina Co. v. Como Feed & Milling Co.*, 325 F.2d 844 (5th Cir. 1963).

Persons owing accounts which have been assigned by the creditor to another as security for an indebtedness may be garnished by the assignee on recovering a judgment against the assignor. *Ralston*

Purina Co. v. Como Feed & Milling Co., 325 F.2d 844 (5th Cir. 1963).

Where the assignment of accounts receivable as collateral security was less than absolute and the assignor retained certain interests, the assignment was not a valid defense in garnishment proceedings brought by the assignee against the assigned account debtors after it had obtained a judgment against the assignor, for the garnishees would be fully protected from double liability under this section [Code 1942, § 2804]. *Ralston Purina Co. v. Como Feed & Milling Co.*, 325 F.2d 844 (5th Cir. 1963).

In view of the protection afforded by this section [Code 1942, § 2804] to the rights of a joint owner, a debt due to several persons jointly, but not as partners, may be garnished by the creditors of one of them. *Fewell v. American Sur. Co.*, 80 Miss. 782, 28 So. 755, 92 Am. St. R. 625 (1902).

A case where a garnishee impleaded assignee of judgment against it, although it had no notice of the assignment at the time writ of garnishment was served. *Schoolfield v. Hirsh*, 71 Miss. 55, 14 So. 528, 42 Am. St. R. 450 (1893).

The statutory mode of procedure is a substitute for the remedy by interpleader in equity. *Kellogg v. Freeman*, 50 Miss. 127 (1874).

2. Right of interpleader.

Where in attachment it is suggested that a party has property of defendant, and such party answers he has no control over the property and does not know whether it belongs to defendant, but that it is in a building he leased defendant, whereupon an order is made that such party surrender property to the sheriff, this is not a garnishment, and does bar the rightful owner of the right to assert title because of the failure of the party sought to be garnished to compel interpleader. *Minshaw v. Geo. W. Davidson & Co.*, 86 Miss. 354, 38 So. 315 (1905).

On the answer of a bank as garnishee denying indebtedness to the defendant, the defendant's transfer by check of a deposit to a third person may be attacked as fraudulent and its validity determined in a court of law, although such third person be summoned not at the sugges-

tion of the garnishee, but of the plaintiff. *Kellogg v. Freeman*, 50 Miss. 127 (1874); *People's Bank v. Smith*, 75 Miss. 753, 23 So. 428 (1898).

In absence of allegation by garnishee of notification of third person's claim, a third person, of his own motion, has no right to come in and claim the money, debt or property. *Porter v. West*, 64 Miss. 548, 8 So. 207 (1886).

The maker of a note cannot maintain a bill of interpleader against an indorsee and an attaching creditor of the payee after the former has obtained judgment by suit, and the latter by garnishment against him. *McKinney v. Kuhn*, 59 Miss. 186 (1881).

3. —After judgment.

Provision for invocation of interpleader after final judgment means that the right of interpleader will exist where notice of the adverse claim by a third person has only been received by the garnishee after final judgment, but not as applying where such knowledge existed before judgment and was voluntarily withheld; in the latter case, it is too late to demand an interpleader after judgment. *Dodds v. Gregory, Stagg & Co.*, 61 Miss. 351 (1883).

4. Duties and liabilities of garnishee.

Where a husband and wife sold land for cash and purchase money notes, which the husband assigned to the wife, and a judgment creditor of the husband garnished the purchaser, it was the duty of the garnishee, the wife being a co-payee on the notes, to suggest the wife's ownership and thereby place the law court in a position to implead the wife and the judgment creditor, and where the garnishee failed to do this, the court could do nothing but render judgment against the garnishee in favor of the judgment creditor. *Russell v. Allen*, 110 Miss. 722, 70 So. 890 (1916).

Where a garnishee, after answer, learns of an assignment of his debt, he must amend his answer or interplead the assignee, otherwise he subjects himself to a double payment of the debt. *Lewis v. Dunlop*, 57 Miss. 130 (1879); *Dodds v. Gregory, Stagg & Co.*, 61 Miss. 351 (1883).

Where the garnishee is indebted to the defendant as guardian and so answers,

and his answer is controverted, and the plaintiff insists that the debt is due to the defendant individually, the garnishee should interplead the guardian or ward, if of age. If he fail to do so and judgment go against him equity will not aid him when proceeded against by the ward. *Horton v. Grant*, 56 Miss. 404 (1879).

Where judgment has not been rendered against the garnishee, the statute provides his remedy. A plea that he has been garnished is not a bar to a suit by a third party; he should be made a claimant under this statute. *Morin v. Bailey*, 55 Miss. 570 (1878).

5. —Payment into court.

Where a railroad company contracted with one to build its roadbed and the contractor sublet a part of the work, and the employees of the subcontractor garnished the railroad company, and the rail-

road company answered stating the facts and paid the money due the contractor into court, its defense was complete and the company fully acquitted. *Herrin v. Warren & Mobley*, 61 Miss. 509 (1884).

6. Procedure.

Where garnishees answered admitting indebtedness but claimed that indebtedness was subject to certain attachments, the answer was too vague and indefinite to raise an issue. *Mechanics' & Traders' Ins. Co. v. Butler*, 115 Miss. 476, 76 So. 521 (1917).

Under Code 1892, § 2143, an issue made up orally was proper, no objection being made, although under Code 1892, § 2144 it could have been required that the claim be propounded under oath. *First Nat'l Bank v. Fain Grocery Co.*, 87 Miss. 503, 40 So. 6 (1906).

§ 11-35-43. Claim of third person tried.

If the claimant, being duly summoned, fail to appear, the court shall adjudge the money, debt, or property to the plaintiff. If he appear, he shall propound his claim to the money, debt, or property in writing under oath; and the plaintiff may take issue thereon, and the same shall be tried and determined as other issues. If the issue be found in favor of the plaintiff, judgment shall be rendered for him against the garnishee, and also for the costs of the interpleader against the claimant; but if the issue be found for the claimant, judgment shall be rendered in his favor against the garnishee, and against the plaintiff for the costs. Where the garnishee has paid money into court, the judgment shall direct its payment to the party entitled thereto, and a judgment therefor shall not go against the garnishee.

SOURCES: Codes, 1857, ch. 52, art. 35; 1871, § 1452; 1880, § 2450; 1892, § 2144; Laws, 1906, § 2352; Hemingway's 1917, § 1947; Laws, 1930, § 1853; Laws, 1942, § 2805.

Cross References — Trial of right of property, see §§ 11-23-1 et seq.
Interpleader proceedings, see Miss. R. Civ. P. 22.
Seizure of person or property, see Miss. R. Civ. P. 64.

JUDICIAL DECISIONS

1. In general.

Trial court may allow judgment creditor to join issue on third party claim after expiration of term to which garnishment was returnable and at which claim was

filed. *Wineman v. Clover Farms Dairy*, 168 Miss. 583, 151 So. 749 (1934).

Trial court's decision allowing judgment creditor to join issue on third party claim after term to which garnishment is re-

turnable is reviewable only in case of abuse of discretion. *Wineman v. Clover Farms Dairy*, 168 Miss. 583, 151 So. 749 (1934).

Under Code 1892, § 2143, an issue made up orally was proper, no objection

being made, although under Code 1892, § 2144 it could have been required that the claim be propounded under oath. *First Nat'l Bank v. Fain Grocery Co.*, 87 Miss. 503, 40 So. 6 (1906).

RESEARCH REFERENCES

Am Jur. 6 Am. Jur. 2d, Attachment and Garnishment §§ 587 et seq.

CJS. 38 C.J.S., Garnishment §§ 321, 324 et seq.

§ 11-35-45. Contest of garnishee's answer by plaintiff.

If the plaintiff believe that the answer of the garnishee is untrue, or that it is not a full discovery as to the debt due by the garnishee, or as to the property in his possession belonging to the defendant, he shall, at the term when the answer is filed, unless the court grant further time, contest the same, in writing, specifying in what particular he believes the answer to be incorrect. Thereupon, the court shall try the issue at once, unless cause be shown for a continuance, as to the truth of the answer, and shall render judgment upon the facts found, when in plaintiff's favor, as if they had been admitted by the answer, but if the answer be found correct, the garnishee shall have judgment for costs against the plaintiff.

SOURCES: Codes, *Hutchinson's* 1848, ch. 56, art. 4 (21), ch. 62, art. 7 (4); 1857, ch. 52, art. 28; 1871, § 1445; 1880, § 2451; 1892, § 2145; Laws, 1906, § 2353; *Hemingway's* 1917, § 1948; Laws, 1930, § 1854; Laws, 1942, § 2806.

Cross References — Seizure of person or property, see Miss. R. Civ. P. 64.

JUDICIAL DECISIONS

1. In general.
2. Time for contest.
3. Trial of issue.
4. —Evidence.
5. —Burden of proof.
6. Judgment.

1. In general.

Under the section, the garnishor must file a written contest to the garnishee's answer in order to frame the issue to be tried. *State Farm Mut. Auto. Ins. Co. v. Eakins*, 707 So. 2d 1100 (Miss. Ct. App. 1997).

Where a judgment creditor failed to join issue raised in answers filed both by the judgment debtor and garnishee as to whether the indebtedness owing by the garnishee to the judgment debtor was dischargeable in bankruptcy, chancery

court was without jurisdiction to render final orders in the garnishment proceedings. *Hunter v. Commercial Sec. Co.*, 237 Miss. 41, 113 So. 2d 127 (1959).

The garnishee's answer is conclusive until contested as provided by law. *Williams v. Jones*, 42 Miss. 270 (1868); *Grenada Bank v. Seligman*, 164 Miss. 168, 143 So. 474 (1932).

2. Time for contest.

Response to a writ of garnishment, claiming a party was not indebted at the time the writ issued, if properly asserted, would have unquestionably entitled the party to relief from the garnishment without the need for a Miss. R. Civ. P. 60(b) inquiry, and the proper remedy was to remand the case to allow the party a reasonable opportunity in the trial court

to contest the denial of indebtedness. *Bechtel Power Corp. v. MMC Materials, Inc.*, 830 So. 2d 672 (Miss. Ct. App. 2002), cert. denied, 830 So. 2d 1251 (Miss. Ct. App. 2002).

The answer of the garnishee must be contested at the return term or leave then granted by the court to contest it at a subsequent term. *Hattiesburg Trust & Banking Co. v. Hood*, 97 Miss. 340, 52 So. 790 (1910); *Mechanics' & Traders' Ins. Co. v. Butler*, 115 Miss. 476, 76 So. 521 (1917).

On certiorari to circuit court an answer of a garnishee in the justice court cannot be contested unless the answer clearly admits liability. *Hattiesburg Trust & Banking Co. v. Hood*, 97 Miss. 340, 52 So. 790 (1910).

This section [Code 1942, § 2806] is imperative in requiring that a plaintiff wishing to contest the answer of a garnishee shall file his traverse at the term to which the answer is filed. Application made at a subsequent term for leave to file such traverse should be denied. *Consumers' Ice Co. v. Cook Well Co.*, 71 Miss. 886, 16 So. 259 (1894).

3. Trial of issue.

The issue cannot be submitted to a jury at the same time with the issue between plaintiff and defendant in attachment. *Roberts v. Barry*, 42 Miss. 260 (1868).

4. —Evidence.

Where the answer is contested, it is not itself evidence. *Lasley v. Sisloff*, 8 Miss. (7 Howard) 157 (1843).

On such an issue it is not necessary to produce the original judgment in evidence. *Lasley v. Sisloff*, 8 Miss. (7 Howard) 157 (1843).

5. —Burden of proof.

In a post-judgment garnishment action in which the garnishee sought to recover against a motor vehicle insurance company on a judgment obtained in a motor vehicle personal injury action, there was a presumption that the person driving the insured motor vehicle did so with the permission of the insured owner. *State Farm Mut. Auto. Ins. Co. v. Eakins*, 707 So. 2d 1100 (Miss. Ct. App. 1997).

Judgment creditor in automobile negligent suit has burden of proving compli-

ance with conditions precedent to recovery under judgment debtor's automobile liability insurance policy in garnishment action against debtor's automobile liability carrier. *Leader Nat'l Ins. Co. v. Lindsey*, 477 So. 2d 1323 (Miss. 1985).

Judgment creditor in automobile negligence suit satisfies burden of proving notice of suit, as condition precedent to recovery under judgment debtor's automobile liability insurance policy, in garnishment action against judgment debtor's automobile liability carrier by evidence showing actual knowledge on part of carrier and its agents of both accident and existence of lawsuit sufficient to enable carrier to take necessary steps to protect itself from legal liability. *Leader Nat'l Ins. Co. v. Lindsey*, 477 So. 2d 1323 (Miss. 1985).

Judgment creditor has burden of proof to show answer was untrue. *Grenada Bank v. Seligman*, 164 Miss. 168, 143 So. 474 (1932).

The burden of proof in such an issue is on the plaintiff, and if it appear that the defendant had assigned the note due by the garnishee the transfer will be presumed to have been bona fide. *Thomas v. Sturges*, 32 Miss. 261 (1856).

6. Judgment.

Judgment on pleadings for judgment creditor on traverse of garnishees' answer held unauthorized, in absence of proof to support contest, though garnishees failed to appear. *Grenada Bank v. Seligman*, 164 Miss. 168, 143 So. 474 (1932).

Where court erroneously rendered judgment on pleadings for judgment creditor traversing garnishees' answer, cause should be remanded to give opportunity to offer proof. *Grenada Bank v. Seligman*, 164 Miss. 168, 143 So. 474 (1932).

One who accepted devise conditioned upon payment of an annuity to another was subject to garnishment for the debts of such other person, and where issue joined upon traverse of the answer was found against him, judgment was properly rendered against him "as if the facts found had been confessed by the garnishee in his answer." *Red v. Powers*, 69 Miss. 242, 13 So. 586 (1891).

RESEARCH REFERENCES

Am Jur. 2 Am. Jur. Pl & Pr Forms (Rev), Attachment And Garnishment, Forms 291 et seq.

§ 11-35-47. Contest of garnishee's answer by defendant.

The defendant may contest, in writing, the answer of the garnishee, and may allege that the garnishee is indebted to him in a larger sum than he has admitted, or that he holds property of his not admitted by the answer, and shall specify in what particular the answer is untrue or defective. Thereupon an issue shall be made up and tried; but the plaintiff may take judgment for the sum admitted by the garnishee, or for the condemnation of the property admitted to be in his hands, notwithstanding the contest.

SOURCES: Codes, 1857, ch. 52, art. 32; 1871, § 1449; 1880, § 2452; 1892, § 2146; Laws, 1906, § 2354; Hemingway's 1917, § 1949; Laws, 1930, § 1855; Laws, 1942, § 2807.

Cross References — Seizure of person or property, see Miss. R. Civ. P. 64.

JUDICIAL DECISIONS

1. In general.

In a garnishment proceeding against an insurer brought by the judgment creditor

of the insured, the insured was not an indispensable party. *Moore v. Sentry Ins. Co.*, 399 F. Supp. 929 (S.D. Miss. 1975).

§ 11-35-49. Transfer to other county; change of venue.

Writs of garnishment, in all cases, may be issued to any county; but if the garnishee whose answer is contested, shall not be a resident of the county, then, upon an issue being made upon his answer, the venue of the trial of the issue may be changed, on his application, to the county of his residence. The court in which the issue is tried shall cause the facts found to be certified and returned with the issue to the court from which the writ issued, and judgment shall be entered thereupon as if the issue had there been tried.

SOURCES: Codes, Hutchinson's 1848, ch. 56, art. 4 (27), art. 13 (4); 1857, ch. 52, art. 29; 1871, § 1446; 1880, § 2453; 1892, § 2147; Laws, 1906, § 2355; Hemingway's 1917, § 1950; Laws, 1930, § 1856; Laws, 1942, § 2808.

Cross References — Change of venue, generally, see §§ 11-11-51 through 11-11-59. Seizure of person or property, see Miss. R. Civ. P. 64.

JUDICIAL DECISIONS

1. In general.

A defendant in garnishment proceedings cannot object to the venue because of the garnishee's residence in another county, and an order of transfer made on

defendant's application is void. *McCloud v. McCullers*, 84 Miss. 20, 36 So. 65 (1904).

A defendant in attachment cannot avail of the right to a change of venue given by this section [Code 1942, § 2808] to gar-

nishees who reside out of the county and whose answers are controverted. McCloud v. McCullers, 84 Miss. 20, 36 So. 65 (1904).

§ 11-35-51. Judgment on issue against garnishee.

If the issue in any case be found against the garnishee, judgment shall be rendered against him for the amount of the debt or money or property in his hands, which judgment shall be in favor of the plaintiff, if necessary to satisfy his judgment or claim against the defendant, or in favor of the defendant, if the judgment of the plaintiff have been satisfied, or for so much thereof as may remain after satisfying said judgment.

SOURCES: Codes, 1857, ch. 52, art. 33; 1871, § 1450; 1880, § 2454; 1892, § 2148; Laws, 1906, § 2356; Hemingway's 1917, § 1951; Laws, 1930, § 1857; Laws, 1942, § 2809.

Cross References — Seizure of person or property, see Miss. R. Civ. P. 64.

§ 11-35-53. Valuation and discharge of judgment.

If the personal property levied on under an attachment, or any part thereof, shall have been left in the hands of the garnishee on his giving bond as prescribed, the court or jury trying the issue between the plaintiff and garnishee, if it find for the plaintiff, shall assess the value of the property left in the hands of the garnishee. If the value of the property equal or exceed the amount due the plaintiff, judgment shall be entered against the garnishee and his sureties on his replevin bond for the sum due the plaintiff. If the value of the property be less than the amount due the plaintiff, judgment shall be entered against the garnishee and his sureties for the value of the property so replevied or left in his hands. If judgment by default shall be rendered against the garnishee, the value of the property so replevied or left in his hands shall be assessed, and judgment shall be entered as above provided. In all cases the judgment against the garnishee and his sureties shall be satisfied and discharged by the delivery to the sheriff of the property replevied or left in his hands within ten days after execution on the judgment shall have come to the hands of the sheriff, and he shall sell the property so delivered to him, and apply the proceeds to the payment of the execution.

SOURCES: Codes, 1857, ch. 52, art. 9; 1871, § 1448; 1880, § 2455; 1892, § 2149; Laws, 1906, § 2357; Hemingway's 1917, § 1952; Laws, 1930, § 1858; Laws, 1942, § 2810.

Cross References — Seizure of person or property, see Miss. R. Civ. P. 64.

JUDICIAL DECISIONS

1. In general.

But in case of a reversal for want of such finding of value the judgment will stand

and a writ of inquiry only be awarded. Atkinson v. Foxworth, 53 Miss. 733 (1876).

The only remedy for an insufficient replevy bond is against the officer taking the same. *Atkinson v. Foxworth*, 53 Miss. 733 (1876).

And the value of each separate item

thereof must be found. *Thomason v. Wadlington*, 53 Miss. 560 (1876).

The jury must assess the value of the property. *Bedon v. Alexander*, 47 Miss. 254 (1872).

§ 11-35-55. No final judgment in certain cases.

Final judgment upon a garnishment shall not go against a surety or accommodation indorser until judgment be rendered against the principal and the cosureties or prior indorsers who may be liable to judgment, if they be residents of the state.

SOURCES: Codes, *Hutchinson's* 1848, ch. 56, art. 13 (1); 1857, ch. 52, art. 30; 1871, § 1447; 1880, § 2456; 1892, § 2150; Laws, 1906, § 2358; *Hemingway's* 1917, § 1953; Laws, 1930, § 1859; Laws, 1942, § 2811.

Cross References — Contract of accommodation party to negotiable instrument, see § 75-3-415.

Suits on indorsed bills and notes, see § 75-13-3.

Law of principal and surety, see §§ 87-5-1.

Seizure of person or property, see Miss. R. Civ. P. 64.

JUDICIAL DECISIONS

1. In general.

A judgment is not erroneous as a violation of this statute unless it appear affirmatively that the principal debtor or other

party liable is a resident of this state. *Thrasher v. John Buckingham & Co.*, 40 Miss. 67 (1866).

§ 11-35-57. Executors and administrators may be garnished.

Executors and administrators may be garnished for a debt due by their testator or intestate to the defendant; but judgment shall not be entered in such case against an executor or administrator until the lapse of six months after the grant of letters; and they may be garnished as having effects due to legatees or distributees; but judgment shall not be rendered against them in such case, except with their consent, until after a final settlement of the estate.

SOURCES: Codes, 1857, ch. 52, art. 24; 1871, § 1485; 1880, § 2457; 1892, § 2151; Laws, 1906, § 2359; *Hemingway's* 1917, § 1954; Laws, 1930, § 1860; Laws, 1942, § 2812.

Cross References — What actions survive against an executor, see § 91-7-235.

Executor or administrator not to be sued for six months, see § 91-7-239.

Seizure of person or property, see Miss. R. Civ. P. 64.

JUDICIAL DECISIONS

1. In general.

Decree in attachment for alimony against executors, as trustees, of estate which was finally settled with all debts

paid except for ten-year trust estate provided by will, which did not interfere with trust although fixing a lien on real estate attached, and awarded wife and child

amount of annuity due husband from estate, held proper, notwithstanding statutory provision that judgment should not be rendered against executors before final settlement without their consent, since there was an actual if not formal settlement, and purpose of statute was to hold

estate free from process against heirs until debts of estate were paid. *Kearney v. Kearney*, 178 Miss. 766, 174 So. 59 (1937).

In a suit against an executor a debtor of the testator may be garnished. *Thrasher v. John Buckingham & Co.*, 40 Miss. 67 (1866).

RESEARCH REFERENCES

ALR. Garnishment against executor or administrator by creditor of estate. 60 A.L.R.3d 1301.

§ 11-35-59. Proceedings if garnishee dies.

If the garnishee dies, like proceedings may be had as provided for in case of the death of a party to an action.

SOURCES: Codes, 1880, § 2458; 1892, § 2152; Laws, 1906, § 2360; *Hemingway's* 1917, § 1955; Laws, 1930, § 1861; Laws, 1942, § 2813.

Joint Legislative Committee Note — Pursuant to Section 1-1-109, the Joint Legislative Committee on Compilation, Revision and Publication of Legislation corrected a typographical error in this section. The word "die" was changed to "dies". The Joint Committee ratified the correction at its December 3, 1996 meeting.

Cross References — Seizure of person or property, see Miss. R. Civ. P. 64.

§ 11-35-61. Garnishee compensation; conditions.

The garnishee shall be allowed for his attendance, out of the debts or effects in his possession, or against the plaintiff in attachment, judgment, or decree in case there be no debts or effects in his possession, provided he shall put in his answer within the time prescribed by law, the pay and mileage of a juror, and, in exceptional cases rendering it proper, the court may allow the garnishee reasonable compensation additional to the foregoing and to be obtained in the same way.

SOURCES: Codes, *Hutchinson's* 1848, ch. 62, art. 7 (6); 1857, ch. 52, art. 37; 1871, § 1454; 1880, § 2448; 1892, § 2153; Laws, 1906, § 2361; *Hemingway's* 1917, § 1956; Laws, 1930, § 1862; Laws, 1942, § 2814.

Cross References — Seizure of person or property, see Miss. R. Civ. P. 64.

JUDICIAL DECISIONS

1. In general.

A garnishee may be allowed compensation for filing his answer together with pay and mileage as a juror, but the court cannot allow him an attorney's fee for defending his answer. *Carruthers-Jones Shoe Co. v. Chickasaw County Bank*, 112

Miss. 315, 73 So. 49 (1916), error overruled, 112 Miss. 650, 73 So. 609 (1917).

A garnishee entitled to costs under this section [Code 1942, § 2814] should be allowed payment of same out of the fund in his hands, although a third person interpleads and establishes his right to

such fund. The garnishing plaintiff is ultimately liable for all costs in such case, but it is error to refuse the garnishee his allowance out of the fund and tax the same against the plaintiff, thereby imposing risk upon the garnishee in collecting costs out of the plaintiff. *Clark v. Gresham*, 67 Miss. 203, 7 So. 223 (1890).

The statute which authorizes the court, in exceptional cases, to allow the gar-

nishee reasonable compensation in addition to per diem and mileage, does not warrant the allowance to him of his attorney's fee in a controversy between the plaintiff and garnishee, the good faith of the transaction between the defendant and the garnishee being the subject of the issue. *Senior v. Brögan*, 66 Miss. 178, 6 So. 649 (1889).

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